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SUPREME COURT OF THE STATE OF COLORADO

No. 15776

DENVER MILK PRODUCERS, INC., HAROLD HENNIGH, E. W. JOHNSON, O. T. HOLLAND, ESTON BUSTER, CARL A. BORGMANN AND WALTER H. BORGMANN, DBA BORGMANN BROTHERS, L. C. AUSTIN AND F. S. AUSTIN BROTHERS, JOSEPH GREEN, FLORA A. BEACH, PERSONALLY AND AS EXECUTRIX OF THE ESTATE OF FRED W. BEACH, DBA BEACH MILK COMPANY, A CO-PARTNERSHIP,

Plaintiffs in Error,

vs.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS' UNION; MILK DRIVERS' AND DAIRY EMPLOYEES' LOCAL UNION No. 537; TEAMSTERS JOINT COUNCIL No. 54; A. F. OF L. OF DENVER, COLORADO; A. E. O'NEAL AS INTERNATIONAL ORGANIZER OF THE INTERNATIONAL, AND PERSONALLY, HAROLD COFFEY, AS SECRETARY AND TREASURER OF THE JOINT COUNCIL, AS RECORDING SECRETARY OF THE LOCAL No. 537, AND PERSONALLY; EARL CHRISTOL AS BUSINESS AGENT OF LOCAL No. 537, AND PERSONALLY; AND C. W. DAVIS, BERTEL R. PETERSON, ROBERT GILLIS, AS EMPLOYEES OF CARLSON-FRINK COMPANY, AS MEMBERS OF LOCAL No. 537, AND PERSONALLY; A. B. BARKER, RAY CERVA AND HENRY OETZEL AS EMPLOYEES OF BEATRICE CREAMERY COMPANY, AS MEMBERS OF LOCAL No. 537, AND PERSONALLY,

Defendants in Error

Error to the District Court of the City and County of Denver, Hon. Joseph J. Walsh, Judge.

STATEMENT OF JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, the above-named defendants in error, as appellants before the Supreme Court of the United States, and hereinafter called defendants, file this, their separate statement particularly disclosing the basis on which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decision appealed from herein as follows:

A. Basis of Jurisdiction

The Supreme Court of the State of Colorado, being the highest court of law and equity in said State, has rendered its final judgment and decision in this cause, wherein the validity of a statute of the State of Colorado, to-wit, the Colorado Labor Peace Act, 1943 Session Laws of Colorado, Chapter 131, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

B. Nature of Case

The case was a consolidation of five actions filed in the District Court of the City and County of Denver seeking injunctions against defendant Milk Drivers Union and certain of its members and officers by virtue of the terms and provisions of the Colorado Labor Peace Act, 1943 Session Laws of Colorado, Chapter 131.

The actions in the District Court were entitled and numbered as follows:

> Denver Milk Producers, Inc., plaintiffs, *v.* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, et al., defendants, Case No. A-45099;

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Harold Hennigh, E. W. Johnson, O. T. Holland, and Eston Buster, plaintiffs, *v.* The International Brotherhood, et al., defendants, Case No. A-45091;

Carl A. Borgmann and Walter Borgmann, dba Borgmann Bros., L. C. Austin and F. S. Austin, dba Austin Bros., plaintiffs, *v* The International Brotherhood, et al., defendants, Case No. A-45106;

Joseph Green, plaintiff, *v.* The International Brotherhood, et al., defendants, Case No. A-45112; and

Flora Beach, et al., plaintiffs *v.* Milk Drivers' and Dairy Employees' Local Union No. 537, The International Brotherhood, et al., defendants, Case No. A-45223.

The controversy in the first four actions above mentioned arose from the fact that members of the defendant union, who were employees of certain dairies in the City and County of Denver did not and would not handle milk hauled by non-union truckers, and it was the purpose of the four suits to coerce and compel members of the defendant union by injunctions to work and perform services and labor in the handling and processing of milk hauled by the plaintiffs in error, hereinafter called plaintiffs.

The plaintiff, Denver Milk Producers, Inc., was an association of milk producers organized under the co-operative marketing law of Colorado. The other plaintiffs were operators of non-union truck lines.

The membership of defendant union included workers in Denver dairies and also truck drivers who hauled milk to the dairies from the milk producers outside of Denver.

The defendant union had sought to unionize plaintiff truck lines, and its members who worked in the Denver dairies would not handle milk that was hauled in by truckers who did not belong to the union.

In the fifth case, *Beach* v. *the Union*, No. A-45223, plaintiff operated a dairy in Denver. He was solicited to enter

into a union contract; he refused, a peaceful picket was established at his premises, and defendant union advised certain retail stores, which constituted the principal outlet for Beach products, that the union would picket said stores if they continued to purchase milk from Beach.

The plaintiff obtained a temporary restraining order, enjoining defendants from:

> "1. In any manner establishing and maintaining a secondary boycott against the products of Beach Milk Co., at any of the Piggly Wiggly stores in Denver, Arvada and Aurora, Colorado, or at any other store in Colorado which purchases the products of the Company for resale to its customers.
>
> "2. In any manner establishing and maintaining pickets against or about the products of the Beach Milk Co., and against said Beach Milk Co. at or about any of said stores, and in any manner publishing it as unfair to union labor to the customers of said stores, and in any manner preventing the delivery of the products of said Company to said stores.
>
> "3. In any manner, interfering with the delivery of the products of the Company to said Piggly Wiggly or other stores.
>
> "4. In any manner, as members of Retail Clerks Union No. 7, American Federation of Labor, refusing to handle and sell the products of said Company, when delivered at the Piggly Wiggly or other stores which purchased the said products prior to September 20, 1945" (Page 379, Abstract of Record).

C. Manner in Which Federal Questions Were Raised

After plaintiffs had produced their evidence in the trial Court, defendants made a motion to dismiss as follows:

> "1. We move the Court at this time to dismiss the petitions for injunction in all of these cases, on the grounds that it affirmatively appears from all the

evidence that there was no violence, there was no force, there were no threats of force or violence, no intimidation, no coercion, and there was nothing more here than a peaceful picketing and the cessation of work on non-union material, in this case being milk, by union men.

"2. That peaceful picketing, such as the evidence here discloses in this court, is protected and sanctioned by the Fourteenth Amendment to the Constitution of the United States, which prohibits the states from depriving any person of life, liberty, or property, without due process of law, and also particularly by the First Amendment, which guarantees the right of free speech, free assembly, free press, and we specifically invoke and claim the protection of the Fourteenth Amendment and the guarantee of free speech and free press and free assembly guaranteed by that amendment.

"3. That it appears from the evidence that the only thing the plaintiffs are complaining about, in substance, is that certain working men who are affiliated with and belong to and are members of the union in question refused, in a peaceable way, to work on, handle or process non-union material which had been transported by non-union haulers who were in competition with union haulers, and we specifically invoke the protection of the Thirteenth Amendment to the Constitution of the United States which prohibits in any place in the United States slavery or involuntary servitude, and we maintain that an injunction issued by this court which they are seeking to get which would compel the employees in these various union plants to work on matters they do not want to work on would be a violation of that amendment, because they would be compelled to work under process of the court, and that is something I conceive is not controllable under our Constitution" (Pages 5 and 6 of the Supplemental Abstract of Record).

This motion was renewed at the conclusion of defendants' evidence.

The District Court granted defendants' motion to dismiss holding:

> "It has been explicity and repeatedly affirmed, not only by the Supreme Court of the United States, but by our own Supreme Court as well, that freedom of speech, freedom of the press, freedom of assembly, when for a lawful purpose, are rights of personal liberty secured to all persons by the due process clause of the Fourteenth Amendment of the Constitution of the United States. They are, indeed, precious rights.
>
> "The court feels that the definition of a 'labor dispute', as defined in the Colorado Labor Peace Act of 1943, is too strained and narrow. That if the conduct of the defendants can be classified so as to make them guilty of unfair trade practices under that narrow definition, and if this definition be permitted to stand, that there has been an invasion of their constitutional rights. * * *
>
> "Holding that the objectives of the defendants and the means pursued to obtain those objectives were lawful, and that to hold otherwise would invade the constitutional rights of the defendants, the temporary injunction heretofore issued by Judge Steele is dissolved.
>
> "The motion of the defendants to dismiss in each and all of the five cases is hereby granted" (Pages 309, 310 Abstract of Record).

The opinion of the District Court is attached hereto as Exhibit "A".

Plaintiffs sued for and obtained a writ of error from the Supreme Court of the State of Colorado to the District Court of the City and County of Denver to reverse the judgment dismissing their complaints. To sustain the judgment of the District Court, defendants contended that the injunctions sought by plaintiff and the provisions of the Colorado Labor Peace Act on which the claim for relief

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was based were contrary to the provisions of the Thirteenth and Fourteenth Amendments to the Constitution of the United States in that, if the injunctions prayed for were granted, defendants would be deprived of their constitutional rights of freedom of speech and of freedom from involuntary servitude.

The Attorney General of the State of Colorado, at the request of the Governor of Colorado and of the Industrial Commission of Colorado, which is charged with the administration and enforcement of the Colorado Labor Peace Act, petitioned for leave of the Supreme Court of Colorado to appear before said Court and file a brief as *Amicus Curiae* on the ground that the constitutionality of certain portions of the Colorado Labor Peace Act was in question. (Copy of said petition is attached hereto as Exhibit "B").

Leave to appear as *Amicus Curiae* was granted to the Attorney General and he filed a brief and presented oral argument before the Court urging the validity of the Colorado Labor Peace Act as against the contentions of defendants that said Act contravened the Thirteenth and Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Colorado sitting *en banc* on May 19, 1947, rendered its judgment and decision reversing the decision of the District Court, two judges dissenting. The majority held:

> "The conclusion is inescapable, and we so hold that the Colorado Labor Peace Act, in so far as applicable here, is in all respects constitutional, valid and enforceable, and that this is not a case 'involving or growing out of a labor dispute' as defined in the act. We also hold that there is no merit to the contentions of the defendants in error that their constitutional rights under the First, Thirteenth, and Fourteenth Amend-

ments to the Federal Constitution will be violated, if the injunction is made permanent.

"The judgment is reversed and the cause remanded with instructions to reinstate the restraining order and make the same permanent, and for further proceedings with respect to damages and otherwise as may be necessary, such proceedings to be in harmony with the views herein expressed" (Page 29 of the opinion of the Supreme Court).

A copy of the opinion of the Supreme Court of Colorado is attached hereto as Exhibit "C".

Defendants were granted time until July 1, 1947, within which to file a petition for rehearing.

On June 24, 1947, defendants filed a petition for rehearing renewing their challenge to the validity of the injunction and the Colorado Labor Peace Act:

"We renew our challenge to the validity of the injunction in that it contravenes the Thirteenth and Fourteenth Amendments of the Constitution of the United States and re-assert our claim that the Colorado Labor Peace Act as construed by the Court deprives us of the Constitutional protection and guarantees of the Thirteenth and Fourteenth Amendments of the United States Constitution, all of which is set out at length in our brief heretofore filed" (Page 5, Petition for Rehearing).

The petition for rehearing was denied on July 7, 1947.

D. Statutory Provisions Believed to Sustain Jurisdiction

The statutory provisions believed to sustain the appellate jurisdiction are Section 237 of the Judicial Code as amended, 28 U. S. C. A. 344.

E. The Statute, the Validity of Which Is Involved

The statute of the State of Colorado, the validity of which is involved, is the Colorado Labor Peace Act, 1943 Session

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Laws of Colorado, Chapter 131. The pertinent provisions of said statute are:

"Section 2(5) 'Collective bargaining' is the negotiation by an employer and the representative of a majority of his employees who are in a collective bargaining unit or their representatives concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

"(6) The term 'collective bargaining unit' shall mean an organization selected by secret ballot, as provided in Section 5, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, provided that where a majority of such employees engaged in a single craft, division, department, or plant shall have voted, by secret ballot, that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or representatives where a majority of the employees in each separate unit shall have voted so to do by secret ballot, as provided in Section 5.

"(7) The term 'labor dispute' means any controversy between an employer and such of his employees as are organized in a collective bargaining unit, concerning the rights or process or details of collective bargaining. The entering into of a contract for an 'all-union agreement' or the refusal of an employer to enter into an 'all-union agreement' shall not constitute a labor dispute. It shall not be a labor dispute where the disputants do not stand in the proximate relation of employer and employee. No jurisdictional dispute or controversy between two or more unions as to which of them has or shall have jurisdiction over certain kinds of work; or as to which of two or more bargaining units constitute the collective bargaining unit as

to which the employer stands impartial or ready to negotiate or bargain with whichever is legally determined to be such bargaining unit, shall constitute a labor dispute. * * *

"(8) The term 'all-union agreement' shall mean an agreement between an employer and a collective bargaining unit representing some or all of his employees, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization.

"(14) No controversy between an employer and his employee shall constitute a labor dispute until after a bargaining unit in accordance with this act is created and a dispute arises between the bargaining unit and the employer.

"Section 6(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in Section 4, or to intimidate his family or any member thereof, picket his domicile, or injure the person or property of such employee or his family or of any member thereof.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in Section 4, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

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"(g) To engage in a secondary boycott, or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining use or disposition of materials, equipment or services, or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services.

"Section 8(1) Any controversy concerning unfair labor practices may be submitted to the Commission in the manner and with the effect provided in this act, but nothing herein shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this act before the Commission shall not have been exhausted."

F. Date of Judgment

The date of the judgment sought to be reviewed herein was May 19, 1947. The petition for rehearing was denied July 7, 1947, and the petition for appeal was presented on August 19th, 1947.

G. Ground on Which It Is Contended Questions Involved Are Substantial

The decision of the Supreme Court of the State of Colorado ordered the District Court to re-instate and make permanent a restraining order against appellants which enjoins appellants from:

"'1. In any manner establishing and maintaining a secondary boycott against the products of Beach Milk Co., at any of the Piggly Wiggly stores in Denver, Arvada and Aurora, Colorado, or at any other store in Colorado which purchases the products of the Company for resale to its customers.

"'2. In any manner establishing and maintaining pickets against or about the products of the Beach Milk Co., and against said Beach Milk Co. at or about any

of said stores, and in any manner publishing it as unfair to union labor to the customers of said stores, and in any manner preventing the delivery of the products of said Company to said stores.

"'3. In any manner interfering with the delivery of the products of the Company to said Piggly Wiggly or other stores.

"'4. In any manner, as members of Retail Clerks Union No. 7, American Federation of Labor, refusing to handle and sell the products of said Company, when delivered at the Piggly Wiggly or other stores which purchased the said products prior to September 20, 1945" (Pages 9 and 29 of the opinion of the Supreme Court, Exhibit "C" hereto).

The injunction so ordered denies to defendants their constitutional right of freedom of speech. *American Federation of Labor et al.* v. *Swing*, 312; U. S. 321; 61 S. Ct. 568; *Bakery and Pastry Drivers, etc.* v. *Wohl*, 315 U. S. 769; 62 S. Ct. 816; *Cafeteria Employees Union, etc.* v. *Angelos*, 320 U. S. 293, 64 S. Ct. 126; *Lovell* v. *City of Griffin*, 303 U. S. 444; 58 S. Ct. 666; *Thornhill* v. *State Alabama*, 310 U. S. 88, 60 S. Ct. 736.

The injunction so ordered by the decision of the Supreme Court of the State of Colorado violates the provisions of the Thirteenth Amendment against involuntary servitude. *Pollock* v. *Williams*, 322 U. S. 4, 64 S. Ct. 792.

H. Cases Believed to Sustain Appellate Jurisdiction

The decision of the Supreme Court of Colorado was a final judgment of the highest court of the State of Colorado. *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 65 S. Ct. 1475; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156; *Forgay* v. *Conrad*, 6 How. 201; 12 L. Ed. 404; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 34 S. Ct. 627, wherein the validity of a statute of the

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State of Colorado was drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity. *Charleston Fed. S. & L. Assn.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624; *Whitfield* v. *Ohio*, 297 U. S. 431, 56 S. Ct. 532, and *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 34 S. Ct. 874. (*Cf. Gospel Army* v. *City of Los Angeles*, 331 U. S. —, 67 S. Ct. 1428).

Respectfully submitted,

PHILIP HORNBEIN,
PHILIP HORNBEIN, JR.,
Attorneys for Defendants-Appellants.

EXHIBIT "A"

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. A-45091—Div. 1

HAROLD HENNIGH, E. W. JOHNSON, O. T. HOLLAND, and ESTON BUSTER, *Plaintiffs*

Civil Action No. A-45099—Div. 4

DENVER MILK PRODUCERS, INC., *Plaintiff*

Civil Action No. A-45106—Div. 1

CARL A. BORGMANN and WALTER H. BORGMANN, d.b.a. BORGMANN BROS., L. C. AUSTIN and F. S. AUSTIN, d.b.a. AUSTIN BROS., *Plaintiffs*

Civil Action No. A-45112—Div. 2

JOSEPH GREEN, *Plaintiff*

Civil Action No. A-45223—Div. 3

FLORA A. BEACH, Personally and as Executrix of the Estate of Fred W. Beach, Doing Business as Beach Milk Co., a Copartnership, *Plaintiffs*

VS.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, AMERICAN FEDERATION OF LABOR; MILK DRIVERS' AND DAIRY EMPLOYEES' LOCAL UNION No. 537; et al., *Defendants*

Opinion and Judgment

These cases were argued and submitted together and may be disposed of in a single opinion because the law involved

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governs the general factual situation existing in all of the cases.

The witnesses who testified in this matter may be grouped as follows:

Representatives of Dairies:

Loran D. Clark, Manager of Carlson-Frink Company, a union dairy since 1938.

Robert H. Reeves, President of Carlson-Frink Company.

G. L. Eicholtz, Plant Manager of Beatrice Meadow-Gold, union.

E. E. Hillmeyer, President, Stearns Dairy Company, union since April 3, 1945.

Howard K. Hall, Creamery Foreman, Brookridge Farm Dairy, union.

Lenus Alm, Owner of the Almhurst Dairy, non-union prior to September 20, 1945. Union since that date.

F. Leonard Beach, Manager, Beach Milk Company, non-union.

Representatives of Dairies and Farmer-Producers:

Walter C. Moore, Manager, Denver Milk Producers, Inc.

Farmer-Producers:

Ray Walker, James L. Johnson, Joseph Green, John Metzger.

Carriers:

Grant L. Vail, formerly non-union—now union.

Ralph Litherland, non-union.

Linton C. Austin, Fred H. Austin, Austin Brothers, non-union.

Fred Rein, Jr., union.

Walter A. Borgmann, brother of Carl Borgmann, doing business as Borgmann Brothers, non-union.

William Thurman Bullard, Owner of the Pioneer Truck Company, union.

Truck Drivers:

Lester Helberg, employed by Austin Brothers.

Lee Helberg, employed by Austin Brothers.

Eugene Anderson, employed by Austin Brothers.
Lloyd Moore, employed by Austin Brothers.
Vern Carlson, employed by Austin Brothers.
Jake Roth, employed by Austin Brothers.
Walter Borgmann, employed by Borgmann Brothers.

Piggly-Wiggly Stores:

E. H. Lambotte, President Piggly-Wiggly Stores Co.
Emory Dorsey, Store 230 E. 13th Ave., union.
Howard Allison, 685 So. Pearl, union.
Joe Lombardi, 2311 Federal Blvd., union.
E. Dwight Montgomery, 44th and Zuni, union.
Walter Silcott, 1201 East 13th Ave., non-union.
Cobert Laws, 1491 So. Pearl, non-union.
Arthur Dykstra, 1215 East Wesley, non-union.
Kelvin Hammond, 4408 Yates, non-union.
William White, 1211 East Alameda, non-union.
Cecil E. Rouse, 9640 East Colfax, non-union.

Union Representatives:

A. E. O'Neal, International Representative of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.
Howard Coffey, Secretary, Local 537.
Earl Christol, Business Agent, Local 537.
Guy E. Downing, President, Local 17.
Edward D. Woodard, Business Agent, Local 17.
Charles F. Lindsey, Organizer for Western Warehouse and Produce Council.
Frank J. Burk, Secretary-Treasurer and Business Agent, Local 452.
Harry Shudeman, Business Agent Local 13.
Norman C. Pixler, Research Director, Joint Council 54.
Paul E. Dinsmore, Business Agent, Local 537.
Edward F. Hogan, Business Agent, Joint Council 54.

Union Employees:

Lindsey White, Creamery Worker, Brookridge Farm Dairy.
A. B. Parker, Creamery Worker, Beatrice Meadow-Gold.

Early in the month of July, 1945, Local No. 537, Milk Drivers and Dairy Employees Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, began a determined effort to unionize the dairy industry in Denver. In pursuance of this plan, and to assist the local unions in obtaining their objective, the International sent one Mr. A. E. O'Neal, an experienced organizer, as its representative to Denver. Mr. O'Neal arrived in Denver July 6th or 7th, 1945, and now claims this as his permanent residence. He receives as compensation for his services $450.00 per month salary, plus expenses.

Certain of the dairies in Denver, engaged in the processing and distribution of milk, had, prior to this controversy, become unionized. These dairies had entered into a contract agreeing to hire only union employees and to abide by union regulations. These dairy employees work on the receiving and processing of milk and are members of various local unions. Some of these dairies, such as Carlson-Frink, which has been operating under a union contract as early as 1938, the Beatrice Creamery Company, Brookridge Farm Dairy, and Supreme Dairy Company, are known and designated as "union dairies" and milk distributed by these dairies is designated as "union milk."

Other dairies, such as the Beach Milk Company, Berkeley Dairy, New Reliable Dairy, Wheatridge Farm Dairy, Royal Crest Dairy, Broadway Creamery and South Gaylord Creamery, have no contracts with the unions, employ non-union help and are designated "non-union dairies" and the milk handled by these dairies is designated as "non-union milk.

Likewise, certain public common carriers, such as the Pioneer and Rein, Jr., having since the inception of this controversy signed contracts with the union, are designated as "union truck lines", and the milk handled by them as "union milk." There are other common carriers, such as Austin Brothers, Borgmann Brothers, Lang, and Litherland, who are designated as "non-union truck lines", and the milk handled by them as "non-union milk."

In the process of organizing dairy employees in non-union dairies, the unions extended their scope of activity to union-

izing employees of various common carriers who transport milk from farmer-producers to the dairy. To further this objective, representatives of the union advised union dairies that they were going to prevent non-union carriers from unloading milk at their dairies. In a number of instances union dairies, such as the Carlson-Frink, Beatrice Creamery and Supreme Creamery, were not permitted to receive milk from non-union carriers such as Austin Brothers, Borgmann Brothers and Colorado Rapid Transit, and from July 30th on there were many instances of union dairies being unable to obtain milk shipped through non-union carriers. A picket line was established at the union dairies on September 6, 1945, and those dairies were advised that if they accepted non-union milk their union employees would be called out. From September 2d to September 14, 1945, union dairies suffered a severe shortage of milk. Of course, this shortage was partly due to seasonable shortage that always exists at this time of the year and partly due to union activities.

Various meetings were held between the interested parties and others in an endeavor to iron out the difficulties. The Denver Milk Producers association had conferences with the defendant Coffey commencing July 1, 1945. Coffey tried to have the association bring pressure on the dairies and truck lines to unionize. He was advised that the association would not be a party to forcing men into the union, that it was a matter strictly up to the men themselves. Meetings also were held at the Colorado Employers Council with James Logan, its head, with a view to arriving at some amicable settlement. Meetings were also held on September 12th in the Mayor's office where Messrs. Hubbard, Brown, Cannon, Reeves, Clark, O'Neal, Coffey, Voorhies, Moore, Minton, Jr., City Attorney Lindsey, Manager of Safety Kirschwing and the Mayor were present. An attempt was made to agree upon a truce of thirty days during which time the union would not picket. Mr. O'Neal, on behalf of the union, stated the union's position, and also stated that Austin, one of the non-union truck lines would, for the present, be permitted to unload at non-union dairies. City Attorney Lindsey wanted an agreement from the union that they would not picket, but the union refused.

The Denver Milk Producers, Inc., plaintiff in case No. A-45099, Division 4, represents some 1200 farmers in eight counties surrounding Denver, namely, Larimer, Weld, Boulder, Jefferson, Adams, Arapahoe, Elbert and Douglas. This association acts as the distributing agent for these farmers, it being the function of the association to see, among other things, that there is more or less equitable distribution of milk among the various dairies and that fair standards as to quality and price are maintained. To be eligible for membership in this association, one must be a farmer-producer of milk and his milk must be acceptable to the Denver City Board of Health and pass City inspection. The City Board of Health inspects the milk twice a week and fixes the grade upon which the price is paid. The City notifies the association if the milk is not up to grade. The farmer-producer enters into a contract with the association whereby he agrees to market his milk through the association permitting the association to commingle his milk with that of other producers. This milk is designated as Grade A milk and the farmer-producer is paid the blended price for this milk, which is sold in fluid form. Fluid milk is milk sold in bottles and being of a higher grade commands a higher price. There are certain grades of milk that are not Grade A, and, therefore, cannot be delivered in Denver. This milk is delivered to dairies such as the Farmers Dairy League outside the City limits.

The association is financially maintained by the farmer-producers permitting a deduction of one cent per pound of butter fat for the milk received at the dairy and which is remitted by the dairy directly to the association. All milk of the farmer-producers is now handled by the association, although prior to the war some 100 farmer-producers shipped their milk to the Adolph Coors Company at Golden, Colorado, who in turn distributed this milk under the supervision of the association to the creamery plants in Denver. When war conditions arose it necessitated Coors discontinuing this practice. Thereafter, the association took the milk directly from the farmer-producer and had it delivered to the creamery plants.

Some dairies have their own herds which supply part of their needs, such as City Park, Brookridge and Cambridge Dairies. Their milk is not pooled with that of other shippers, although some of them do get milk from the pool. The pool handles 98 per cent of all milk produced. The dairies supply the association with reports twice a month as to the amount and quality of the milk and notify the dealer what he is to pay the farmer. There is also a bonus plan whereby a farmer gets a three-cent bonus when his milk is up to a certain standard. Every creamery dealer pays the same price for the same grade of milk. The shipper can pick his own dairy and the association has nothing to do with the milk insofar as the handling of it or where it goes is concerned.

This case involves interference by the union with the activities of the association, which contracts with the farmer-producer to see that delivery of his milk to the dairies is made, and the further attempt on the part of the union to bring pressure on the association to have it use its influence in getting the dairies and truck lines to unionize.

Mr. Walter C. Moore, who is the Manager of the association, testified that in addition to the talk with Mr. Coffey on July 1, 1945, Coffey also called him Saturday, July 28th, relative to what was troubling Ted Hayes, foreman of the Gold Coin Dairy; also, he had gotten word July 30, 1945, that Colorado Rapid Transit would not be permitted to unload milk at non-union dairies. He also attended a meeting of Colorado Employers Council, at which Coffey, O'Neal, Christol, and James Logan, President of the Council, were present, when an attempt was made by Mr. Logan to adjust the difficulty so that milk would not be destroyed. It was agreed that milk could go into non-union plants providing it was not delivered by union drivers. He also told of a meeting with Austin and Bullard on September 1, 1945, when Mr. Austin came to his office relative to what should he do with the milk consigned to union dairies, and at that time received a list of non-union dairies he could deliver to. Mr. Moore wanted to prevent unfair competition between Bullard, who was union, and Austin, who was non-union. He also attended a meeting at the Fairview School, four miles east of Boulder, on September 18, 1945, at which five

union representatives, namely, Messrs. Voorhies, Coffey, O'Neal, Lindsey, and Christol, were present. A Mr. Clincy, a producer, had asked for the meeting. Various questions were put up to the union representatives, such as, "Would a farmer handling his own milk have to join the union?", and on being told that he would not, the union was asked about the occurrence with Ray Walker. Mr. O'Neal and the union men spoke and outlined their position.

Borgmann Brothers and Austin Brothers, plaintiffs in Case No. A-45106, Division 1, are common carriers who transport milk to the dairies. Other truck lines are operated by Ralph Litherland, Fred Rein, Jr., and William Thurman Bullard. During the period of this controversy the owners of these truck lines and their employees were contacted to become unionized, but Austin Brothers, Borgmann Brothers, Litherland, and their employees declined. On the other hand, Fred Rein, Jr., and William Thurman Bullard (owner of the Pioneer Truck Line, of Boulder) under pressure became unionized.

The Austin Brothers and the Borgmann Brothers case involves interference by the union in preventing these carriers from unloading milk at union dairies. In addition to this grievance Austin Brothers complain that on the morning of September 2, 1945, a number of the representatives of the local unions, most of whom were officials in one capacity or another of various locals, went to Boulder and congregated opposite the garage where the Austin trucks were housed. These union men followed these trucks as they made their pick-ups and deliveries from the farms on into Denver. Austin Brothers also maintained a truck at Niwot, Colorado, and one of the automobiles occupied by the union men followed this truck on its pickups and deliveries, and instilled fear into the heart of the Austin driver. On behalf of the defendants there was no denial of this union activity, they admitting that they had gone to Boulder and Niwot on the early morning of September 5, 1945 and following the Austin trucks, but maintained their purpose was purely peaceable and was for the purpose of finding out where the milk was being diverted in Denver. The union representatives stated that this action was determined upon at a

meeting held at union headquarters the night before. They further maintained that at no time was there any threats made, and that there was no violence.

The Borgmann truck line is non-union, and prior to this time had served both union and non-union dairies. The company owns two trucks, one driven by Walter Borgmann, who was a witness in these cases and is a brother of Carl, the owner, and the other truck is driven by an employee, one Maurice Cochell. Borgmann Brothers, in addition to operating the truck line, engage in farming and have twenty to twenty-five head of cows and deliver not only their own milk, but also the milk of some other thirty-seven farmer-producers. The truck line overlaps with other truck lines, such as Colorado Rapid Transit and Lang. It covers a large territory, but is only exclusive for three shippers. The Borgmanns were first advised of union activity on Sunday, September 2, 1945 when they made their usual deliveries but when the Austin Brothers were not permitted to unload milk at union dairies. On September 6, 1945 he failed to make deliveries at union dairies, being first stopped at the Supreme Dairy Company because the driver did not have a union card. Prior to and during this period Borgmanns were contacted by union representatives and had a number of conferences as to whether the line would be interested in joining the union, but they were not. Borgmann stated that shippers had advised him that if the union interferred with their unloading of milk to tell them to go to hell. This was communicated to Coffey, who replied that if the shippers had to feed their milk to the hogs for thirty or sixty days they might change their minds.

Joseph Green and James L. Johnson, farmer-producers, rode to town with their milk on Borgmann's trucks. Joseph Green rode with Walter Borgmann on September 8th and 10th. On September 8th, at the Carlson-Frink creamery, a union dairy, permission was asked to unload the milk as an owner-operator, but permission was denied. The same thing happened on Monday, September 10, 1945, with the result that the milk had to be taken to non-union dairies and unloaded. Tuesday, September 11th, permission to unload at the Supreme Dairy was denied, although permission had been granted two days previously.

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James L. Johnson rode with Walter Borgmann to the Supreme Dairy, a union dairy, on Sunday, September 9th, and he was permitted to unload his milk as an owner-operator, but after leaving the Supreme Dairy and driving to the Beatrice Meadow-Gold, another union dairy, they were contacted by Coffey and three other union representatives and denied permission to unload their milk. The Borgmann truck line has had friendly relations with the South Broadway and Berkeley creameries, which are non-union, and the company feels that if it became unionized it would be letting these non-union creameries down. The company feels indebted to them by reason of past favors. Borgmann stated that on one occasion when he was contacted, Coffey said "Borgmann, we will get you by hook or by crook."

Mr. Coffey, the union representative, admitted that he was at the Carlson-Frink creamery when union members refused to handle non-union milk, but denied that there was any threat made to Borgmann that they were going to get him to join by hook or by crook, and that all of his talks with Mr. Borgmann were on a friendly basis. When unable to deliver milk they contacted the Denver Milk Producers association and advised Mr. Weber, of the association, that it was up to the association to find a market for their milk.

Joseph Green, plaintiff in Case No. A-45112, Division 2, involves the interference by the union with the delivery of his milk to union dairies in company with Borgmann, and he verified Walter Borgmann's testimony as to the two instances on September 8th and 10th when he requested that he be permitted to unload his own milk as an owner-operator and was denied such permission. Those available for the picking up of the Green milk were the Borgmann Brothers and the Colorado Rapid Transit. Borgmann is non-union and Colorado Rapid is union, but Green prefers to do business with Borgmann instead of Colorado Rapid Transit.

The Plaintiffs, Harold Hennigh, E. W. Johnson, O. T. Holland and Eston Buster, in Case No. A-45091, Division 1, participate in a national milk marketing program known as the "Golden Guernsey Program," with headquarters

located at Petersboro, New Hampshire. These men are all members of the Denver Milk Producers association. They produce a superior quality of milk which is sold at a premium. After being pasteurized by the Carlson-Frink Company, which is the sole dairy that pasteurizes and markets it, this milk is sold separate and apart from other milk products and is sold at a premium. The carrier of this milk has been Austin Brothers, non-union truck line. As Carlson-Frink Company is the only dairy participating in this program and is a union dairy, and as the Austin Brothers are the carriers for this milk, and being non-union, and were not permitted to unload this milk, the supply thereof was shut off from Sunday, September 2, 1945 through to September 12, 1945.

The Beach Milk Company, plaintiff in Case No. A-45223, Division 3, is a non-union dairy. It was contacted to join the union some six or eight months prior to the time the present controversy arose, but was not interested at that time. On September 1, 1945, the Beach Milk Company had a production of about 2200 gallons of milk, employed 27 persons, of whom 21 would be eligible for union membership. At the time this controversy arose they were in the process of erecting a new boiler plant which it was hoped would be in operation by November 1, 1945. The company sells milk to restaurants, hotels, the Piggly-Wiggly Stores and the Army. Its two largest customers are the United States Government, which takes 1000 gallons of milk daily for Buckley Field, and some 24 to 26 Piggly-Wiggly stores, supplying practically the entire supply of milk retailed by these stores. F. Leonard Beach is the Manager of the Company, which was originally a co-partnership composed of his father and mother. The father is now deceased and his estate is in the course of administration.

The Company was contacted by Messrs. Coffey and Christol, Union representatives, on September 10, 1945 and F. Leonard Beach was advised if he did not sign a union contract his plant would be picketed and pressure would be brought to bear on the Piggly-Wiggly Stores to have them discontinue purchasing Beach milk. Up to this time the Company was getting both "union" and "non-union" milk.

After unsuccessful negotiations to sign up the Company and its employees in the union, the plant was picketed—the picket carrying a sign with the legend "Unfair to Local No. 537."

Negotiations with union representatives extended over a number of days and also with Mr. Nathan Creamer, attorney for the Beach estate. At one of these sessions Mr. Beach asserted that Mr. Christol had said, in answer to a question by Mr. Beach as to what would happen if he did not join the union, "the union will put forth every effort to destroy the Beach Milk Company as a business." Mention of a secondary boycott was implied by mention of the union's power with the Piggly-Wiggly Stores. Picketing did start on the Beach plant on September 10, 1945 and continued until the temporary restraining order was issued by Judge Steele on September 21, 1945. This interference on the part of the union caused the Company to lose producer-shippers, such as those that came over the Rein truck line which became unionized and would not deliver to his plant. The Company also maintains that it had the problem that if it did become unionized it would lose farmer-producers who had evinced animosity towards unions and union dairies. From September 10th to 21st many of the company's regular shippers were cut off and the company had to obtain milk of an inferior grade from Johnstown to make up some of the deficiency. There was also interference with the union bricklayer working on the boiler plant, who ceased employment and the Company had trouble one time in getting its coal promptly delivered by the Rio Grande Fuel Company, which employs union drivers.

Under the Army contract the Beach Company is obligated to furnish a special grade of milk. The farmer-producer receives a bonus for the milk produced by him and in turn the Army was permitted to buy this milk from the Beach Company at a one-half cent increase in price per quart above the OPA ceiling price. To obtain this high-grade quality milk, the Beach Company installed a special inspection system whereby the herds of the farmer-producers were regularly inspected and scientifically improved methods of production imposed on the farmer-producers and insisted on.

Loss of the Piggly-Wiggly and Army business would have been serious to the Company because it would have had a large supply of milk for which there would have been no outlet.

There was no denial on the part of the union that it had had negotiations with Mr. Beach looking to unionizing the plant, that it had established a picket line, that a number of union representatives had congregated across the street one day, and that the truck drivers delivering milk to the dairy were contacted in an attempt to get them to join the union, but stated that all of this was done in a peaceable manner, without any disturbance and with no threat of violence.

During this period of time the Almhurst Dairy and the Stearns Dairy suffered interference. With respect to the Almhurst Dairy, it was a non-union dairy and, like the Beach Milk Company, was engaged in construction work under a union contractor employing union labor. Lenus Alm is the owner of the Almhurst Dairy, located at 190 West Nevada and has seven employees. It is a member of the Denver Milk Producers association and, as stated, was a non-union dairy prior to September 20th or 21st, since which time it has become unionized. Sometime in September, 1945, there were three union bricklayers working on the addition which was to cost somewhere in the neighborhood of $40,000.00 and about four more weeks were needed to complete the building. His employees had never asked whether they should join or not join the union. Union representatives Coffey and Christol contacted him sometime before September 17th. They had a union contract and wished him to sign, and advised him at that time that they had Beach about signed up. Tuesday, September 18, 1945, he was again contacted and asked if he was ready to sign up and he asked Coffey and Christol to come to his home to discuss the matter because they could discuss it more quietly. In the meantime he had talked to James Logan and Mr. Hall of the Colorado Employers Council and had advised them that he was going to be picketed unless he joined the union and wanted their advice. His place was picketed, so he called Coffey from Logan's office and Coffey promised to take the picket off if he

signed, so he did sign a union contract on September 20th or 21st, but frankly states that he would not have signed if the union bricklayers had not struck. He maintained that he was paying more than the union scale to his employees. He also contacted Mr. Moore of the Denver Milk Producers association, who advised him he did not have to sign with the union and Mr. Moore thought he could get milk into his plant without his signing. In his discussions with his employees about joining the union some said they would and some said they would not.

With respect to the Stearns Dairy, on April 3, 1945 they had signed a contract with the union, but certain conditions of the contract as to wages and commissions had not been agreed upon. These issues had been submitted to a panel of the National War Labor Board, but the Board had failed to issue directive order and the matter had been referred back to the employer and employees. Mr. Hillmeyer, President of the Stearns Dairy, was contacted one morning somewhere between 4:30 and 5:00 o'clock, A. M., and advised that if he did not sign a union contract his milk would not go out. After some bickering, he acceded to the demands of the union. The Stearns Dairy used to receive milk delivered by non-union carriers, and upon being advised that his employees could and would not work on this milk he was compelled for over a week to haul his own milk. Mr. Coffey, the union representative, admitted that there was a controversy with the Stearns Company and with respect to the refusal of the drivers to deliver milk on September 7, 1945. Mr. Coffey claimed that Mr. Hillmeyer had broken an appointment to settle the matter, but that the matter was finally settled, namely, on the morning of September 7, 1945, by Mr. Hillmeyer agreeing to the union's conditions, namely, paying back pay of $100.00 and $210.00 per month to the drivers.

In carrying out the threat of a secondary boycott made by the union representatives to the Beach Milk Company, various union officials, namely, Coffey, Christol, Pixler, Dinsmore and Maxwell (the latter representing the Retail Clerks' Union) contacted Mr. E. H. Lambotte, President of the Piggly-Wiggly Stores Company, which operates under a franchise from the main office with headquarters in

Atlanta, Georgia. Some nine owners or managers of Piggly-Wiggly stores were also contacted. Mr. Lambotte discussed the milk situation with Mr. O'Neal, Mr. Coffey and Mr. Voorhies (the latter a representative of the Bakery Drivers Union). Mr. Lambotte was advised on September 11, 1945, that the union was having trouble with the Beach Milk Company and he was requested to use his good offices in trying to persuade Beach to sign a union contract, and he was advised that if Beach refused it might be necessary to establish a secondary boycott of the Piggly-Wiggly stores. Lambotte did call Beach. On September 19, 1945 Coffey advised Lambotte that the union was going to picket the Piggly-Wiggly stores. Coffey was considerate of their position and advised him to have the stores make their arrangements for a milk supply.

The company has no special policy as to whether its stores are union or non-union, leaving it to the individual store whether to unionize or not. Lambotte was advised by Mr. O'Neal that no picket line would be established until they got another supply. However, on Thursday, September 20th, he was advised that the stores would be picketed the next day, so he advised Beach not to deliver and also contacted every Piggly-Wiggly store as to the situation. The issuance of the temporary restraining order obviated further action, as Beach was allowed to continue deliveries. He states that Piggly-Wiggly relations with the union had been friendly and all of the negotiations he had were conducted in a businesslike manner without threats. He was confident no store would accept Beach milk if it was picketed.

As stated, some nine Piggly-Wiggly owners and managers were contacted prior to September 20th, four of them being union and five non-union stores. They were advised not to accept Beach milk and there were instances where the union representatives were angry because certain owners had accepted milk after being advised not to do so. In one instance William White, manager of Piggly-Wiggly store at 1211 East Alameda was advised by Mr. Dinsmore on September 20, 1945, that there was trouble with Beach and stated to Mr. White, "I am telling you now if you accept milk tomorrow from Beach we will slap a picket on the store." The Piggly-Wiggly stores got practically

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all of their supply of milk from the Beach Milk Company.

Ray Walker, a farmer-producer delivers milk with his own truck to the Carlson-Frink Company. On September 6th he was warned that unless he joined the union, union dairies would not accept his milk, so he went to union headquarters and paid a month's dues.

John L. Metzger is a lawyer and farmer-producer, also a member of Denver Milk Producers, Inc. He formerly shipped his milk through the Pioneer truck line to the Carlson-Frink Company. When this controversy arose he felt the union activities were wrong and notified the Pioneer truck line to deliver his milk to Beach and on their failure to do so he protested to the Public Utilities Commission with a complaint to revoke their permit, as he felt that under their permit of public necessity and convenience they were obligated to carry his milk to the dairy he designated. The witness admitted the use of strong language during this controversy.

Harold K. Hall, creamery foreman at the Brookbridge Farm Dairy, a union dairy, had various conferences with union representatives who came to the plant. He was advised by Mr. Coffey that the union was not going to allow women to work in the dairies. On September 2, 1945, union representatives Dinsmore and three or four other members came to the plant and said they were there to prevent Austin Brothers from unloading milk and if he did they would pull the men out of the plant. On Monday, September 3, 1945 when advising Coffey that this was a free country and they could not use Hitler tactics on him and that he was going to use non-union milk whether they liked it or not, Coffey advised him if he did someone was going to get shot. Coffey denied making any such statements and said that the statements relative to women not working in the plants was that they would have fifteen days in which to join the union.

The situation existing in each case may be gathered from the foregoing general statement of facts. Of course, some of the facts overlap in the various cases, while other facts are pertinent only to a particular case. However, in general the situation must be viewed as constituting one controversy.

The court listened with attention to the logical and well prepared arguments of counsel for the respective parties; has examined with care not only the many authorities cited by counsel, but additional authorities as well; has made a careful analysis of the evidence to which the court must apply the law, and has come to the conclusion that this case can be decided by an answer to this question:

Can the State pass an act defining a "labor dispute" so as to enjoin a union from the commission of certain acts defined to be unfair labor practices, when the purpose is to urge employer and employees to join a union, and where there exists no employer-employee relationship?

If so, many of the cases cited by counsel for the plaintiffs apply and the temporary injunction heretofore issued should be made permanent, and the question of damages determined on further trial. On the other hand, if the State is prohibited from so defining a labor dispute that the commission of certain acts deprives the defendants of certain fundamental rights secured to them by the Constitution of the United States, then the cases cited by counsel for the defendants apply and the motion to dismiss should be granted.

The Colorado Labor Peace Act, Chapter 131, Special Laws of 1943 (subdivision 2-a, Chap. 97, 1943 Cum. Supp. 2, 1935 C.S.A.) defines the term "labor dispute", in subsection 7 of Sec. 2, as follows:

> "The term 'labor dispute' means any controversy between an employer and such of his employees as are organized in a collective bargaining unit, concerning the rights or process or details of collective bargaining. The entering into of a contract for an 'all-union agreement' or the refusal of an employer to enter into an 'all-union agreement' shall not constitute a labor dispute. It shall not be a labor dispute where the disputants do not stand in the proximate relation of employer and employee."

Then in Section 6 it defines what are unfair labor practices, and in Section 7 what are not unfair labor practices and Section 8 prevention of unfair labor practices.

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Judge Sackmann, in his well reasoned opinion in the case of *American Federation of Labor* v. *Reilly*, which went to our supreme court and is reported in 155 Pac. (2) at 145, held valid certain sections of the Labor Peace Act which the plaintiffs in that case insisted were unconstitutional.

These sections make picketing, boycotting, striking, and other union activities unfair labor practices under certain conditions and circumstances. Judge Sackmann held these to be simply regulations and limitations upon the type of unlawful conduct criticized in many of the cases which he quoted. Our supreme court said that Judge Sackmann was premature in declaring these sections valid, that it was not proper under our Declaratory Judgment Act to so proceed and that their constitutionality could only be determined when a concrete situation involving them had actually arisen.

> "This leaves for our consideration the trial court's ruling on sections 6(1)(c), 6(2)(g), 6(2)(l), 8(15) and 11(2), which makes picketing, boycotting, striking and other existing union activities, under certain circumstances, unfair labor practices. The plaintiffs contend that the restrictions proposed constitute a denial to labor organizations and their members of the rights of free speech, assembly and to contract, and otherwise deprive them of rights protected under the Fourteenth Amendment to the Federal Constitution, and constitute an attempt to impose involuntary servitude in violation of the Thirteenth Amendment, and that the trial court so erred in declaring them valid. As appears from its opinion, the trial court recognized 'that many of the questions here passed on by the court in regard to the various separable provisions of the Colorado Peace Act (in which category the subsections last cited above must be placed) many approach very closely to an advisory status, and the anticipatory conditions have not yet arisen and do not arise on the face of the statute itself,' and thus might not be within the purview of our Uniform Declaratory Judgments Act. Notwithstanding, in the performance of what it considered its responsibility to further a final disposition of the

issues, the court proceeded to their complete adjudication.

"We are convinced, for the reasons which follow, that instead of so acting, the court, in accord with its initial view above quoted, should have declined to pronounce declaratorily on the phase of the case in discussion.

"Under our Uniform Declaratory Judgment Act, where results to occur from the enforcement of a statutory provision can be predicted with certainty, as is the situation with respect to sections 20 and 21 and interrelated subdivisions, or where the basic right of the state to enter legislative fields said to be the domain of the Federal Government is questioned, as here is done by the contention relating to the National Labor Relations Act, a court properly may declare with respect to the validity of a statute, but in the very nature of things the law makers in passing the Uniform Declaratory Judgment Act did not intend that a court should enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions, the effect of which, in concrete situations, not yet developed, could not be definitely perceived."

As the supreme court further said:

"Certainly, it seems to us, in conflicts as to the construction or application of these subsections, if such arise, properly may be resolved only in concrete situations in actual cases."

We have now come to concrete situations in five actual cases before us and must construe and apply these subsections to the facts before us in the five cases and determine their applicability.

The evidence disclosed in its entirety that no labor dispute, such as that defined in the Act, existed, and therefore defendants would be guilty of the commission of unfair labor practices, as defined in the Act. The question then is to determine whether certain fundamental rights secured to all citizens by the Constitution of the United States have

been invaded. The plaintiffs maintain that it is within the power of the State to define a "labor dispute," and that by the Colorado statute it has been defined so as to exist only where an employer-employee relationship exists. They further maintain that by the Act the historic right of injunction has only been taken away where a labor dispute does not exist as therein defined. On the other hand, the defendants claim that certain fundamental rights secured to them by the Constitution of the United States have been invaded, if it was intended to mean that an actual labor dispute can only lawfully exist where the majority of the employees of a particular employer were participants, and where an employer-employee relationship exists.

It must not be forgotten that originally the attitude of courts in general was hostile to the rights of labor, and that it has only been due to a more enlightened consideration of the rights of labor and of the justice due the laboring man that the harshness of many of the earlier decisions has been ameliorated. Mr. Justice Brandeis, in tracing the development of the rights of the working men, said in his dissenting opinion in

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 27 A. L. R. 375:

> "In England a working man struggling to improve his condition, even when acting singly, was confronted until 1813 with laws limiting the amount of wages which he might demand. Until 1824 he was punishable as a criminal if he combined with his fellow workmen to raise wages or shorten hours, or to affect the business in any way, even if there was no resort to a strike. Until 1871 members of a union who joined in persuading employees to leave work were liable criminally, although the employees were not under contract, and the persuasion was both peaceful and unattended by picketing. Until 1871, threatening a strike, whatever the cause, was also a criminal act. Not until 1875 was the right of workers to combine in order to obtain their ends conceded fully."

And then goes on to say:

> "In the United States the rules of the common law governing the struggle between employer and employee have likewise been subjected to modification. These laws have been made mainly through judicial decisions. The legal right of workingmen to combine and to strike in order to secure for themselves higher wages, shorter hours, and better working conditions received early general recognition. But there developed great diversity of opinion as to the means by which, and also as to the persons through whom, and upon whom pressure might permissibly be exerted in order to induce the employer to yield to the demands of the workingman."

This conflict between property rights and human rights is set forth in *Truax v. Corrigan, supra,* decided December 19, 1921, a case in which pickets during a strike had resorted to libelous language and threats, the U. S. Supreme Court invalidated an Arizona statute prohibiting court injunctions against peaceful picketing. Chief Justice Taft, in passing on the constitutionality of the Arizona act, said:

> "A law which operates to make lawful such a wrong as is described in plaintiff's complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the 14th Amendment."

And further:

> "The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

However, at the same term of court Chief Justice Taft in:

American Steel Foundries v. Tri-City Central Trades Council, et al., 257 U. S. 208, 42 Sup. Ct. 72, 66 L. Ed. 199, 27 A. L. R. 360, decided December 5, 1921,

said in what was the beginning of a more liberal attitude towards labor:

"It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of § 20 (Clayton Act), includes injury to business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment."

And further stated:

"A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. But while this is so, we must have every regard to the congressional intention manifested in the act, and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to communicate with them, and to persuade them to join the ranks of his opponents in a lawful economic struggle. Regarding as primary the rights of the employees to work for whom they will and undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor,

and keeping in mind the right of the employer, incident to his property and business, to free access of such employees, what can be done to reconcile the conflicting interests?"

"Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity, which may try one mode of restraint, and, if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business, and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant; that such representatives should have the right of observation, communication, and persuasion, but with special admonition that their communication, arguments, and appeals shall not be abusive, libelous, or threatening, and that they shall not approach individuals together, but singly, and shall not, in their single efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence, and which may be varied in other cases. It becomes a question for the judgment of the chancellor, who has heard the witnesses, familiarized himself with the locus in quo, and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."

In many cases, courts found that the picketing union had no membership amongst plaintiffs' employees, and held that the union had no right to demand of plaintiffs that their employees join the union.

In

Safeway Stores, Inc. v. Retail Clerks' Union, 184 Wash. 322, 51 P. (2d) 372,

decided November 8, 1935, the court said:

> "The conduct of respondents in conjunction with that of appellant, cannot be determined a labor dispute. It is an unwarranted attempt on the part of respondent to compel appellant, against its right of choice, to become active in the cause of respondent, with the result that upon the failure of that attempt, respondent purposely commenced and continued picketing."

And again, the same court, in

Adams v. Building Service Employees Union, 197 Wash. 242, 84 Pac. (2d) 1021,

decided Dec. 6, 1938, said:

> "The question whether a 'labor dispute', within the Labor Dispute Act of this state, is involved where a union is engaged in picketing an employer's place of business, and on account of the refusal of the employer to enter into an agreement with the union respecting wages and hours of labor of his employees, where the union in question is not composed of employees of employer involved, is foreclosed by Safeway Stores *v.* Retail Clerks Union, 184 Wash. 322."

The court felt in these two cases that there was no labor dispute as defined within the Labor Disputes Act, and that picketing an employer under such conditions entitled him to injunctive relief.

In

Roth v. Local Union, 24 N. E. (2d) 280,

decided December 22, 1939, an employer was picketed to compel a closed shop agreement, none of his employees belonging to the union. The Indiana statute, like our statute, prevents the employer from interfering or coercing employees in their right to join or not join a labor union. The court said in that case:

> "The facts are not here in dispute. The court finds from the evidence (which is not before us) that the

plaintiff had performed all obligations imposed upon him by law; that he was at peace with his employees: that none of them belonged or wanted to belong to the picketing union; and that the object of the picketing complained of was to compel the plaintiff, against its desire, to sign a closed shop contract, whereby his employees would be compelled to join the union against their will or be discharged, which, as we have already pointed out, the plaintiff was prohibited from doing by positive law. Under these circumstances, the picketing was wrongful and oppressive, and it ought to have been enjoined."

In

Simon v. Schwachman, 18 N. E. (2d) 1,

a Massachusetts case, decided December 16, 1938, the union picketed an employer who had three employees, in an attempt to compel a closed shop agreement. The court granted an injunction against such picketing, although it was peaceful, because it was in aid of an unlawful act. The court said:

"But it is settled that the statute gives protection in such cases only where there is a lawful trade dispute lawfully conducted."

"In this case the acts of the defendants are not justifiable under the common law of this commonwealth even with the peaceful persuasion act added, because there is no lawful trade dispute recognized by that law. * * * Only where a labor union itself has contractual relations with an employer, as by an agreement for a closed shop, may the union take coercive action in its own right."

In

Mitnick v. Furniture Workers Union, 200 Atl. 553,

a New Jersey case, decided July 8, 1938, there was an attempt on the part of the union to compel plaintiff to sign a union contract, although none of his employees belonged

to the defendant union. On his refusal, secondary picketing of his customers followed. The court, in granting an injunction, stated:

> "None of these recited facts are in dispute, except that defendants claim that none of their activities included any threats, intimidation or attempted coercion. These activities are defended on the ground that they are entirely peaceable, are merely in furtherance of the interests of the members of the defendant union, and for the information of the public. Except for an argument in justification of the distribution of such circulars, and to be hereinafter discussed, the facts of this controversy would not merit discussion, as where no strike or labor controversy exists, picketing of the employer's place of business is unlawful."

Wisconsin Employment Relation Board v. Milwaukee Ice Cream Drivers and Dairy Employees Union, 238 Wis. 379, 299 N. W. 31,

decided June 25, 1941, a case where the plaintiff, for several years, had an all-union contract which was about to expire. On giving notice of termination, the company informed the union that it would enter into a new contract, but would not enter into a contract containing an all-union provision, unless such provision was desired by three-fourths of the employees, as required by the Wisconsin law. Upon petition by the company, the Board held a referendum and its employees voted against the all-union provision. Thereafter the union picketed. The court said:

> "The terms of the statute cannot be stretched to permit a union to enforce by picketing demands which the employer may not lawfully accede to. No more may this be done by court decision. Picketing that so aims is unlawful, although it is free from violence."

In

Retail Clerks Union v. Wisconsin Employment Relations Board, 242 Wis. 21, 6 N. W. (2d) 698,

decided December 11, 1942, the court stated:

> "As hereinbefore indicated, we hold that the evidence sustains a finding that the purpose and intent of the picketing was to put pressure upon the employer to commit an unfair labor practice and coerce its employees to join the union. This being the purpose, the picketing is unlawful; and under the decisions of this court and the United States supreme court, it may be enjoined."
>
> *Fashioncraft, Inc. v. Halpern, et al.*, 48 N. E. (2d) 1,

a Massachusetts case, decided March 29, 1943, was a case in which the union had picketed an employer in an attempt to compel the execution of a closed shop agreement. The court said:

> "Picketing, however, may be more than a means for making public the facts of a labor dispute. The presence of persons, patrolling along the highway abutting the employer's premises; marching back and forth in more or less close formation; obstructing passage to those entering or leaving the premises; impeding free and uninterrupted travel along the public way, may be sufficient to induce breaches of the peace and other infractions of the law designed to preserve the safety and security of society. Such a situation may arise irrespective of the nature of the information conveyed by the pickets. Although picketing may be affiliated with free speech, a State is not required to tolerate picketing of all types and may regulate and restrict it in order to avert some definite substantial danger clearly arising from the method adopted by pickets."

The court further said:

> "In this commonwealth a strike for a closed shop is for an unlawful labor objective. It is not a lawful dispute but a tort."

And further stated:

> "Just as picketing may become unlawful through the use of unlawful methods, it may also become un-

lawful if directed to the accomplishment of an unlawful purpose."

In

Wisconsin Labor Relations Board v. Rueping Leather Co., 228 Wis. 473, 279 N. W. 673, 117 A. L. R. 398,

decided May 17, 1938, the court said:

"The State may, therefore, regulate labor relations in the interest of the peace, health and order of the State."

Under these authorities, it is the contention that the State, under its undoubted right under its police power, may so define a labor dispute as to make the commission of certain acts unlawful. Constitutional decisions of the Supreme Court of the United States rendered obsolete, more or less, much of the established judicial precedents that had been established.

It is to be noted that the experimentation upon which Chief Justice Taft frowned in Truax *v.* Corrigan has come to pass. Justice Brandeis in his dissenting opinion in that case, commencing upon experimentation, said:

"The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiments within the law."

We feel that what he contended for in that case has now become the law.

Identification of peaceful picketing with the right to freedom of speech was first intimated in

Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229

decided May 24, 1937, when Mr. Justice Brandeis, speaking for the majority, said that the right of free speech guaranteed by the Federal Constitution entitled a union to make known the facts of a labor dispute:

"Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

The conflict between the principles of State Sovereignty and the United States Supreme Court's power and function under the First and Fourteenth Amendments to protect, safeguard and hold inviolable the private rights of citizens against oppression by the state came to a head in:

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093,

and

Carlson v. California, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104,

both decided April 22, 1940. By these cases the supreme court evolved new liberalizing principles and peaceful picketing became judicially identified with free speech under the protection of the Federal Constitution. By these decisions peaceful picketing was henceforth beyond legislative prohibition because it was constitutionally protected under freedom of speech under the First and Fourteenth Amendments.

This liberalizing principle was followed in

American Fed. of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855,

decided February 10, 1941, wherein Mr. Justice Frankfurter, who deliveerd the opinion of the court, said:

"In No. 1 Milk Wagon Drivers Union *v.* Meadowmoor Dairies, decided this day (312 U. S. 287, ante 836, 61 S. Ct. 552, 132 ALR 1200), we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, 310 U. S. 620, 84 L. ed. 1393, 60 S. Ct. 1081, it seemed to present a similar problem. More thorough study of the record and full argument have reduced

the isue to this: is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

The facts were that the union tried to picket Swing's beauty parlor. A permanent injunction was issued against the union on the ground that "peaceful persuasion" was forbidden because those who were enjoined were not in Swing's employ. The court then says:

"All that we have before us, then, is an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing en masse or otherwise conducted' so as to occasion 'imminent and aggravated danger.' Thornhill *v.* Alabama, 310 U. S. 88, 105, 84 L. ed. 1093, 1104, 60 S. Ct. 736. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Steel Foundries *v.* Tri-City

Central Trades Council, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 ALR 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case."

And again this liberalized principle was followed in

Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, et al., v. Wohl and Clatzman, decided March 30, 1942, 315 U. S. 769, 86 L. ed. 1178, 63 Sup. Ct. 816,

a case in which the union endeavored to induce peddlers engaged in the distribution of bakery goods to work only six days a week and to employ an unemployed union member one day a week. Upon refusal, peaceful picketing of bakers from whom these peddlers obtained their goods, and also picketing of places of business of the peddlers' customers, carrying signs notifying the public of the dispute, was instituted. Mr. Justice Jackson, who delivered the opinion of the Supreme Court, said:

"So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statute, and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course, that does not follow: one need not be in a 'labor dispute' as defined by statute law to have a right under the 14th amendment to express a grievance in a labor matter by publication, unattended by violence, coercion, or conduct otherwise unlawful or oppressive.

"The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that 'we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week.' Opera-on-Tour *v.* Weber, 285 N. Y. 348, 34 N. E. (2d) 349, 136 A. L. R. 267, writ of certiorari denied in 314 U. S. 615, ante, 495, 62 S. Ct. 96. But this lacks the deliberateness and formality of a certification, and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered.

"We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue."

Justice Douglas, concurring, in a separate opinion, stated:

> "If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from Thornhill *v.* Alabama, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736. We held in that case that 'the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.' p. 102. While we recognize that picketing could be regulated, we stated (pp. 104, 105):
>
> " 'Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.' "
>
> "But since 'dissemination of information concerning the facts of a labor dispute' is constitutionally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. Its statute (Civil Practice Act, § 876a) as construed and applied in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bankers. But the statute is not a regulation of picketing per se—narrowly drawn, of general application and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the Thornhill Case are to survive, I do not see how New York can be allowed to draw that line."

Of course, it is true that where there is violence and intimidation the court can, in the exercise of its equitable powers, issue an injunction.

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In

Milk Wagon Drivers Union of Chicago, Local 753, etc. et al., v. Meadowmoor Dairies, Inc., 312 U. S. 287, 85 L. ed. 836, 132 A. L. R. 1200,

decided February 10, 1941, the United States Supreme Court upheld the issuance of an injunction by the Illinois court, where that court had issued an injunction against all picketing in an industrial dispute where past picketing had been accompanied by violence and other unlawful conduct, so as to give belief that future picketing would be carried on with a continuance of illegal acts.

Mr. Justice Frankfurter, in the majority opinion, said:

"It must never be forgotten, however, that the Bill of Rights, was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

"Still it is of prime importance that no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

"• • • The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinos found. We cannot say that such a find-

ing so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. Ethyl Gasoline Corp. *v.* United States, 309 U. S. 436, 84 L. ed. 852, 60 S. Ct. 618."

However, the court further stated that despite the opinion upholding the court of Illinois to enjoin, this decision did not qualify the Thornhill and Carlson decisions. In a strong dissenting opinion Justice Black said:

"It is on the basis of my study of the entire record that I rest my conclusion that the forfeiture of the right to free speech effected by the injunction is not warranted. In reaching this conclusion, I fully recognize that the union members guilty of violence were subject to punishment in accordance with the principles of due process of law. And some of them have in fact been prosecuted and convicted. Punishment of lawless conduct is in accord with the necessities of government and is essential to the peace and tranquility of society. But it is going a long way to say that because of the acts of these few men, six thousand other members of their union can be denied the right to express their opinion to the extent accomplished by the sweeping injunction here sustained. Even those convicted of crime are not in this country punished by having their freedom of expression curtailed except under prison rules and regulations, and then only for the duration of their sentence.

"No one doubts that Illinois can protect its storekeepers from being coerced by fear of damage to their property from window-smashing, or burnings or bombings. And to that end Illinois is free to use all its vast resources and powers, nor should this Court stand in the way so long as Illinois does not take away from its people rights guaranteed to them by the Constitution of the United States."

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In

Lafayette Dramatic Productions v. Ferentz et al., 305 Mich. 193, 9 N. W. (2d) 57, 145 ALR 1158,

decided April 8, 1943, a case in which the defendant union demanded that the plaintiff theatre employ union musicians. In reversing the lower court, which had dismised plaintiff's complaint asking that a contract it had entered into with the defendant union under duress be declared null and void, and also for injunctive relief because a labor dispute was involved, the court said:

> "It is plain that defendants' demand that plaintiff employ musicians had no reasonable connection with any dispute or controversy relating to wages, working conditions, hours of work, health, safety, the right of collective bargaining or the protection of labor from abuses. The situation did not involve any dispute between plaintiff and members of defendant musicians' union or between plaintiff and members of defendant stage hands' union regarding wages, working conditions or regarding other legitimate controversial labor matters. The situation involved only the question of the right of the defendant unions to combine their efforts for the purpose of compelling plaintiff either to employ an orchestra it did not need or want or to submit to a strike of its employees, which would have prevented the opening and operation of its theatre. If the object sought to be obtained by defendants was not a lawful labor objective, the court would be justified in exercising control of their acts."

In that case the court relied on:

Carpenters and Joiners Union v. Ritter's Cafe, 315 U. S. 722, 724, 62 S. Ct. 807, 808, 86 L. ed. 1143,

decided March 30, 1942, where the defendant union picketed the restaurant of Ritter because he employed nonunion help in the construction of a building a mile and a half from the restaurant, and that had no connection with the restaurant. In upholding the Texas court, which issued a restraining order, Mr. Justice Frankfurter said:

"In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare."

The Lafayette opinion then continues differentiating the present case from *Lauf v. E. G. Shinner & Co.* that was relied on:

"Defendants contend, and the trial court held, that the present case involved a labor dispute within the meaning of Act No. 176, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 8628-1 et seq.) (Stat. Ann. 1942 Cum. Supp. § 17, 454 (1) et seq.), being an act to create a board for the mediation of labor disputes. By such contention defendants apparently sought to bring the matter under the jurisdiction of the State labor mediation board. Relying upon Lauf *v.* E. G. Shinner & Co., 303 U. S. 323, 58 S. Ct. 578, 88 L. ed. 872, the trial court held that a 'labor dispute or controversy' was involved in the present cases. The question in the Lauf case was whether or not the factual situation presented constituted a labor dispute within the terms of Wisconsin Statutes 1937, § 103.62 (3). In defining the term 'labor dispute' such statutory provision was much more comprehensive than the corresponding provision of our State statute cited above, in that it also provided 'or any other controversy arising out of the respective interests of employer and employee.' The Lauf case is not determinative of the question before us. We are convinced that the present case does not involve a labor dispute within the meaning of our State statute. Furthermore, defendants may not claim that a bona fide

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labor dispute is involved when the object they sought to accomplish was an unlawful labor objective."

That a union may peaceably put its case before the public even though no employer-employee relationship exists was held in

Cafeteria Employees Union v. Angelos, et al., 320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58.

Picketing was by a union against an employer who operated his own restaurant on a small scale, conducting the business without the aid of any employee, and the sole purpose of the picketing was to compel the proprietor to employ union labor. The United States Supreme Court, in reversing the lower court which had issued an injunction, said:

> "The Court here, as in the Swing Case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' American Federation of Labor *v.* Swing, 312 U. S. at 326, 85 L. Ed. 857, 61 S. Ct. 568."

and the court, further distinguishing the situation that existed in *Milk Wagon Drivers Union v. Meadow Moor Dairies*, said:

> "The present situation is thus wholly outside the scope of the decision in Milk Wagon Drivers Union *v.* Meadowmoor Dairies, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, 132 ALR 1200. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear 'that the power to deny what otherwise

would be lawful picketing derives from the power of the states to prevent further coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence.' 312 U. S. at 296, 85 L. ed. 842, S. Ct. 552, 132 ALR 1200."

In

American Federation of Labor et al. v. Bain (Ore.) 106 Pac. (2d) 544, 130 ALR 1278,

decided October 22, 1940, the court was called upon to pass upon the constitutionality of a statute relating to labor disputes. Sections 1 and 3 of the Act provided, in substance, that the term "labor dispute" meant and included only an actual bona fide controversy in which the disputants stood in proximate relation of employer and the majority of his employees and which directly concerned matters directly pertaining to wages, hours, or working conditions of the employees of the particular employer directly involved in the controversy. That it was unlawful to picket premises used by an employer unless there was an actual bona fide existing labor dispute between the employer and his employees and that it was also unlawful to boycott directly or indirectly an employer not directly involved as a party to a labor dispute.

The question was whether the prohibition of picketing and boycotting in these sections invaded the plaintiff's fundamental rights and liberties of freedom of speech and of assemblage. It was agreed that these sections constituted the heart of the act and that reading them together they meant picketing and boycotting were unlawful in all cases save those in which an employer and the majority of his employees were engaged in an actual, bona fide controversy which directly concerned matters pertaining to wages, hours, or working conditions. The court reviewed at length many decisions, commencing with *Lovell v. Griffin*, 303 U. S. 444, 82 L. ed. 949, decided March 29, 1938, down to the Thornhill and Carlson cases, decided April 22, 1940.

The Oregon court, in answer to the argument that the act was valid under the reserved powers of the state, said:

"The proponents of the statutes insisted that they were enacted in the exercise of the reserved powers of

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the states to pass laws for the promotion of the public peace, safety and general welfare; to prevent the occasions of disorder, violence and the destruction of property, and unwarranted interference with legitimate business. These contentions were answered by the court in the Thornhill case. It was said: 'We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping prescription of freedom of discussion embodied.' "

"We have thus, at more than ordinary length, reviewed these decisions, because the plaintiffs are here claiming that fundamental rights, secured to them by the Constitution of the United States, are invaded by the challenged statute. In the field of federal constitutional law the Supreme Court of the United States is the final arbiter. Its decisions as to the meaning of the provisions of the Constitution bind us all—state judges, under their oaths of office, no less than others. Our own personal, individual views as to the soundness of such decisions are immaterial. Unless, therefore, some real, not fanciful, basis of distinction exists between the prohibitions of the Alabama statute and the California ordinance declared repugnant to constitutional guaranties in these cases, and the like restrictions on the conduct of individuals contained in the statute here under consideration, this court has no other alternative than to declare the statute unconstitutional."

Then as to the contention that there must be an actual bona fide labor dispute, the court said:

"No claim is made by the proponents of the present statute that in defining the term 'labor dispute' it was intended to declare that an actual labor dispute could not lawfully exist unless the majority of employees of a particular employer were participants. Such a construction would result in imputing to the people a purpose to ignore actualities. Counsel for the defendants agree with the view of the court below that the definition of a labor dispute in the statute is 'merely a draftsman's device for shortening the phraseology of the

act,' by describing the class of cases to which the prohibition on picketing does not apply. In this construction we concur. Thus, there remains a wide field of labor controversies in which picketing is declared to be unlawful. Hence, there is no room for a contention—and none has been made—that the Thornhill and Carlson cases are not controlling, because the Supreme Court limited its decisions to the right to publicize the facts of a labor dispute. The prohibitions of the statute under review clearly include picketing in bona fide labor controversies."

In

E. L. Kearns Company v. Joseph G. Landgrat et al., 128 N. J. Eq. 441, 16 At. (2d) 623, 131 ALR 1063,

decided December 12, 1940, a case in which there was neither a strike nor a dispute between employer and employees, the court, by a divided opinion, held that a permanent injunction restraining the union from distributing circulars advising that E. L. Kearns' beverages were non-union and requesting the purchase of union-made beverages could not be upheld, the court said:

"We are of the opinion, and so hold, that, under the circumstances exhibited in the instant case, the restraint imposed constitutes an infringement of the union's right of freedom of speech and freedom of press both under our State and Federal Constitutions, notwithstanding the fact that there was no strike nor dispute between complainant and its employees. For an analogy in principle compare, Thornhill *v.* Alabama, supra; Carlson *v.* California, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104."

The note following this case in 131 ALR shows the more liberal attitude that has developed, and states:

"In Seattle Brewing & Malting Co. *v.* Hansen (1905); CC 114 F 1011, which it will be noted was decided at a time when the attitude of the courts toward the activities of labor unions was less liberal, it was held that

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conduct of various members of labor unions, who, in addition to making threats to various handlers of beer produced by a brewery with which they were in dispute, circulated notices among the public, some of the notices stating: 'Organized labor and friends: Don't drink scab beer:' and naming various kinds of beer as 'unfair,' and others of them stating: 'Guard your health by refusing to drink unfair beer,' naming various beers as unfair, including that manufactured by the complainant, constituted a boycott which would be enjoined, the court saying: 'Those things tend to unfairly obstruct the business of the complainant, and in that far these defendants are wrong, and it is the duty of the court to restrain them from doing anything that will interfere with the complainant's business.' "

In

People of the State of New York v. Hans Muller, et al., 286 N. Y. 281, 36 N. E. (2d) 206, 136 ALR 1450,

the syllabus says:

"2. Peaceful picketing by the members of a labor union in front of a business served by the union is an exercise of a right of free speech guaranteed by the Constitution of the United States."

And at page 1452 of the A.L.R. report the court has this to say respecting picketing:

"The picketing is for the purpose of promoting the lawful interests of a labor union in a labor dispute. Goldfinger *v.* Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910, 116 A.L.R. 477. There is here a 'labor dispute' as that term is defined in section 876-a of the Civil Practice Act even under the restrictive interpretation of the scope of the statute by this court in Opera on Tour, Inc. *v.* Weber, 286 N .Y. 348, 34 N. E. (2d) 349, 136 A.L.R. 267. Even were that not true, however, peaceful picketing by the members of a union in front of a business served by the union is the exercise of a right of free speech guaranteed by the Constitution of the United

States. American Federation of Labor *v.* Swing, 312 U. S. 321, 61 S. Ct. 569, 85 L. ed. 855, decided February 10, 1941; Bakery and Pastry Drivers and Helpers Local 802, decided by the Supreme Court of the United States June 2, 1941. Construction of the Federal Constitution by the Supreme Court of the United States is binding on all State courts."

It will be noted that the court said there was a labor dispute even under the restrictive interpretation of the statute, and that even if this were not true, peaceful picketing is the exercise of free speech.

There is a strong dissenting opinion by Justice Finch, who stated, p. 1453:

"We are thus brought to a consideration of the fundamental question involved, namely, whether picketing of a storekeeper, who has acquired and is now using as an ultimate consumer a burglar alarm apparatus, is lawful. May this complainant be coerced into taking sides in a labor dispute in another industry to which he was not a party, in which he has no interest, and where no legitimate action of his could dispose of the controversy? If the complainant had submitted to the coercion of the union and its members by allowing them to service the burglar alarm system, he would have subjected himself to liability for damages for breach of contract. On the other hand, if he refused, his business and trade would suffer serious jeopardy by the continued picketing of his premises. Looking at the matter realistically, the parading of pickets in front of a retail store, even though the conduct of the picket is peaceful and orderly, seriously interferes with the business of the store. There are many persons among the population who, because of personal convictions, will not cross a picket line besides many timid persons who fear bodily harm or other retaliation, and hence choose another store."

• • • • • • •

"The picketing of this ultimate consumer, who is not engaged in the industry in which the labor dispute has

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arisen, provides a true secondary boycott which has always been held an unlawful labor objective and which this court has recently condemned. In People *v.* Bellows, 281 N. Y. 67, 77, 22 N. E. (2d) 238, 242, this court said: 'In this particular we differ with the Special Sessions and hold that such picketing, which has been declared unlawful by this court, does constitute disorderly conduct.' "

Our own Supreme Court has indicated a liberal attitude towards labor that has been in consonance with the decisions of the Supreme Court of the United States, for in:

Denver Local Union No. 13 et al. v. Perry Truck Lines, Inc., et al., 106 Colo. 25, at p. 32,

decided March 18, 1940, the court said:

"Prior to the adoption of the federal and state Norris-LaGuardia Acts the Judicial conception of a 'labor dispute' was based primarily on the construction of section 20 of the Clayton Act (29 U.S.C.A., Labor, §52), which was to the effect that courts had no jurisdiction to issue injunctions to restrain peaceful picketing where the dispute was between employers and employees, but otherwise had such jurisdiction. The Norris-LaGuardia legislation, federal and state, was adopted to allay a deep and bitter feeling on the part of the laboring classes, caused by a narrow construction of the words 'labor dispute' by the judicial branch of the government, and it resulted in a more comprehensive definition of the terms by legislative action, so as to include all legitimate labor controversies involving all terms and conditions of employment, 'regardless of whether or not the disputants stand in the proximate relation of employer and employee.' This enlarged definition, to permit peaceful efforts by a labor organization to unionize a particular business, was foreshadowed by Chief Justice Taft in the case of American Steel Foundries *v.* Tri-City Council, 257 U. S. 184, 42 Sup. Ct. 72, 66 L. ed. 189, where this eminent jurist said (pp. 209, 210): 'The strike became a lawful instrument in a lawful

economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.

And again in:

Denver Local Union No. 13 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America et al. v. Buckingham Transportation Co. et al., 108 Colo. 419, at 424,

decided October 27, 1941:

"When the district court was called upon to decide this case the authorities generally were in an unsettled state as to the basic question involved, and no decision of this court on that subject had been promulgated. That state of uncertainty has been dissipated by recent decisions of the United States Supreme Court, as well as our own. We recently held, in Denver Union *v.* Perry Truck Lines, 106 Colo. 25, 101 P. (2d) 436, that under the State Norris-LaGuardia Act, a labor dispute as therein defined might exist between an employer and a labor union even though there was no controversy between such employer and his own employees. Also, in that case—presaging the holding of the Supreme Court of the United States in Thornhill *v.* Alabama, 310 U. S. 88, Sup. Ct. 736, 84 L. Ed. 1093—we held that peaceful picketing had its basic roots in the constitutional guaranties of liberty and freedom of speech. Under these decisions and others of the United States Supreme Court hereinafter cited, there is now no question that a state may not by its common-law or statu-

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tory policy prohibit peaceful persuasion, through peaceful picketing, notwithstanding the occasioning labor dispute is not an immediate employer-employee one."

The most recent case the Court has examined is:

State v. Superior Court, 164 Pac. (2d) 662,

decided December 12, 1945, a Washington case, in which there is a careful review of many authorities, just as there was in the *American Federation of Labor v. Bain* case:

> "Relators contend that the problem presented in the cases at bar is one of freedom of speech, a right guaranteed by the First Amendment to the Constitution of the United States reading as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> "Relators argue that peaceful picketing is but a manifestation and a function of the exercise of freedom of speech and can be restrained only upon those grounds and conditions which warrant restraint in any other case involving freedom of speech. The right of freedom of speech guaranteed by the First Amendment, and originally confined to federal jurisdictions and to acts of Congress, has been extended to protect against encroachment of judicial, legislative or administrative acts of the various states under the scope of the Fourteenth Amendment to the United States Constitution which provides * * * 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The court then states:

> "In S. and W. Fine Foods, *v.* Retail Delivery Drivers, 11 Wash. 2d 262, 118 P. 2d 962, we followed American Federation of Labor *v.* Swing, 312 U. S. 321, 61 S. Ct.

568, 85 L. ed. 855, and overruled Safeway Stores *v.* Retail Clerks' Union, 184 Wash. 322, 51 P. 2d 372, Adams *v.* Building Service Employees, 197 Wash. 242, 84 P. 2d 1021; Fornill *v.* Auto Mechanics Union, 200 Wash. 283, 93 P. 2d 422; and Shively *v.* Garage Employees, 6 Wash. 2d 560, 108 P. 2d 354. We held that the right of a labor union peacefully to picket the plant of an employer is protected by the First and Fourteenth Amendments to the Federal Constitution guaranteeing the right of free speech, even if there is no employer-employee relationship existing between the employer and the members of the union. We held that injunction would not lie to restrain members of a salesmen's union from picketing the warehouse of a wholesale dealer in an endeavor to compel the dealer's salesmen to join the union, even though such picketing resulted in the refusal of the dealer's warehousemen to cross the picket line and in the refusal of the union teamsters to haul its merchandise, where it appeared that the picketing was peaceable and that it was not associated with a secondary boycott. See Weyerhauser Timber Co. *v.* Everett District Council et al, 11 Wash. 2d 503, 119 P. 2d 643 to the same effect."

It will be noted that two of the Washington cases, namely, *Safeway Stores v. Retail Clerks' Union*, and *Adams v. Building Service Employees, supra*, which were cited by plaintiffs in the instant case, and to which this court has made specific reference, have been overruled. The Washington Court then concludes:

"Peaceful picketing is a manifestation of the exercise of freedom of speech and it can be restrained only upon those grounds and conditions which warrant restraint in any other case involving freedom of speech. The test upon which abridgment of speech may be justified '* * * is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent * * *' Schenck *v.* United States, 249

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U. S. 47, 52, 39 S. Ct. 247, 249, 57 S. Ct. 732, 81 L. ed. 1066, and Thomas *v.* Collins, 323 U. S. 516, 65 S. Ct. 315. • • •

"The peaceful picketing in the cases at bar is but an exercise of the right of freedom of speech and is not of such a nature as to warrant the restraining orders."

We believe that in accord with what the Supreme Court of the United States, as well as our own Supreme Court, have held, that the legislature could not prohibit peaceful stranger picketing even if it wanted to, because all peaceful picketing is an exercise of the constitutional guaranty of free speech.

We recognize that all courts agree that violence and intimidation on the part of pickets are unlawful and that they almost unanimously condemn the use of false labels and dishonest posters and banners, and that they hold secondary boycotts to be unlawful. But unfortunately, the courts do not generally recognize in the specific cases the legality of peaceful picketing.

In the instant case, were the objectives of the defendants lawful? Were the means pursued to obtain these objectives lawful? If the purpose of the defendants was to organize the dairies and truck lines serving the milk industry in Denver, in order to secure to workers in that industry the benefits of collective bargaining, with respect to betterment of wages, hours of work, and other terms and conditions of employment, the purpose was lawful. If there was no violence, intimidation, threats, or other unlawful conduct but only peaceful persuasion, then the means were lawful. If the purpose was lawful and the means lawful, then any law that would prohibit, infringe, or so restrict this lawful purpose so as to make its accomplishment impossible would be, in the opinion of the court, unconstitutional. Of course, the State, without the present statute, can prevent violence, intimidation, threats, or other unlawful acts. The court feels that the objectives of the defendants and the means used to secure those objectives were lawful, and so holds. It has been explicitly and repeatedly affirmed, not only

by the Supreme Court of the United States, but by our own Supreme Court as well, that freedom of speech, freedom of the press, freedom of assembly, when for a lawful purpose, are rights of personal liberty secured to all persons by the due process clause of the Fourteenth Amendment of the Constitution of the United States. They are, indeed, precious rights.

The court feels that the definition of a 'labor dispute', as defined in the Colorado Labor Peace Act of 1943, is too strained and narrow. That if the conduct of the defendants can be classified so as to make them guilty of unfair trade practices under that narrow definition, and if this definition be permitted to stand, that there has been an invasion of their constitutional rights.

Contention has also been made that certain of the plaintiffs, who are common carriers, are entitled to an injunction because under the law a common carrier operating under a permit of Public Necessity and Convenience, is under a duty to carry property tendered to it by the public for shipment. There are cases such as the

Burlington Transportation Co. v. Gordon Hathaway et al, (Ia.) 12 N. W. (2d) 167, 149 A. L. R. 1238,

decided December 14, 1943:

> "Upon this record one clear reason for the granting of the injunction is readily apparent. The concerted action of the defendant union had for its object an act prohibited by law. The plaintiffs are all common carriers and as such they were bound to carry property tendered by the public for shipment. • • •
>
> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order."

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However, as stated in the note to this case in the A. L. R. edition:

> "No one has, at least in recent times, suggested that the employees of a common carrier or other public utility are not entitled to strike, or to take other measures constituting the customary concomitant of a labor dispute, merely because such measures would interfere with the performance of the employer, in its capacity as common carrier or other public utility, of its duty to the public."

Contention has also been made that the acts of the defendants in going to Boulder and congregating outside of the Austin Brothers garage was unlawful. To find so would be the denial of the right of lawful assembly.

The court said in

Frank Hague, etc. v. Committee for Industrial Organization et al, 307 U. S. 496-533, 83 L. ed. 1423 at 1436,

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

Could the union peaceably picket the Piggly-Wiggly stores, and if they had would this not have constituted a secondary boycott?

In

Goldfinger v. *Feintuch,* 276 N. Y. 281, 11 N. E. (2d) 910, 116 A. L. R. 477, at 280,

decided December 7, 1937, the court said:

> "Likewise it is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest. Nor it is legal to threaten to ruin the custom and trade generally or to accost or interfere with customers at the entrance to the store. Disorderly conduct, force, violence, or intimidation by pickets should be sternly suppressed by the police and administrative authorities.
>
> "Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer, but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit."

And then further held:

> "We do not hold more than that, where a retailer is in unity of interest with the manufacturer, the union may follow the nonunion goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the nonunion product, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer."

We hold that there was such a unity of interest between the Beach Milk Company and the Piggly-Wiggly stores that the actions of the union did not constitute a threat to establish a secondary boycott.

Holding that the objectives of the defendants and the means pursued to obtain those objectives were lawful, and that to hold otherwise would invade the constitutional rights of the defendants, the temporary injunction heretofore issued by Judge Steele is dissolved.

The motion of the defendants to dismiss in each and all of the five cases is hereby granted.

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Done and signed in open court this 27th day of February A. D. 1946.

By the Court, (S.) Joseph J. Walsh,
Judge.

Ruling on Dependant's Motion to Quash Summons on A. E. O'Neal

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union has made a motion to quash the service of summons on A. E. O'Neal, on the ground that said defendant is an unincorporated society having no office in the State of Colorado and having no managing or general agent residing therein, and that A. E. O'Neal was not such a managing or general agent that service could be made upon.

This court has had occasion to consider this matter in *Case No. A-40524, Local Union No. 402 of the United Brotherhood of Carpenters and Joiners of America v. The United Brotherhood of Carpenters and Joiners of America.* In that case there was similar service as in this case, and the court held the service to be good. The defendant, United Brotherhood of Carpenters and Joiners of America, requested of our Supreme Court that a writ of prohibition be issued. This was denied.

The court is of the opinion that the service on A. E. O'Neal constituted service on the International, and is good. Accordingly, the motion to quash the service is denied.

By the Court, (S.) Joseph J. Walsh,
Judge.

Denver, Colorado, February 27th, 1946.

EXHIBIT "B"

Motion for Leave to File Brief as Amicus Curiae

Comes Now H. Lawrence Hinkley, Attorney General of the State of Colorado, and moves the Court and requests the Court that he be permitted to appear before this Court as Amicus Curiae in the above entitled cause.

Proceeding under Rule 115(g) of the Colorado Rules of Civil Procedure, the Attorney General set forth the following by reason whereof such leave is sought:

1. On March 8, 1946, the Governor of the State of Colorado requested that the Attorney General ask leave to appear as Amicus Curiae, inasmuch as the constitutionality of certain portions of the Colorado Labor Peace Act (chapter 131, Session Laws 1943) was in question.

2. On March 9, 1946, the Industrial Commission of Colorado made a similar request of the Attorney General.

3. Rule 57(j) of the Colorado Rules of Civil Procedure contemplates that the Attorney General be heard when a statute is alleged to be unconstitutional. The last sentence of that subdivision is as follows:

> "In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard."

4. The Attorney General as the legal representative of the administrative agency charged with enforcement of the law interested in the questions submitted and desires to be heard on the issues before the Court.

WHEREFORE, the Attorney General respectfully files motion herein and requests leave of the Court to appear as Amicus Curiae herein and that he be permitted to file brief herein within a reasonable period to be fixed by this Honorable Court.

(S.) H. LAWRENCE HINKLEY,
Attorney General of the
State of Colorado.

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EXHIBIT "C"

No. 15776

May 19, 1947.

DENVER MILK PRODUCERS, INC., HAROLD HENNIGH, E. W. JOHNSON, O. T. HOLLAND, ESTON BUSTER, CARL A. BORGMANN and WALTER H. BORGMANN, dba Borgmann Brothers, L. C. AUSTIN and F. S. AUSTIN, dba Austin Brothers, JOSEPH GREEN, FLORA A. BEACH, Personally and as Executrix of the Estate of Fred W. Beach, dba Beach Milk Company, a Co-partnership, *Plaintiffs in Error,*

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS' UNION; AMERICAN FEDERATION OF LABOR; MILK DRIVERS' AND DAIRY EMPLOYEES' LOCAL UNION No. 537; TEAMSTERS JOINT COUNCIL No. 54; A. F. of L. of Denver, Colorado; DANIEL J. TOBIN, as President of the International and Personally; DAVE BECK, as Officer and Business Agent and Western States Organizer of the International, and Personally; A. E. O'NEAL, as International Organizer of the International, and Personally; HAROLD COFFEY, as Secretary and Treasurer of the Joint Council, as Recording Secretary of the Local No. 537, and Personally; EARL CHRISTOL as Business Agent of Local No. 537, and Personally; and C. W. DAVIS, BERTEL R. PETERSON, ROBERT GILLIS, as Employees of Carlson-Frink Company, as Members of Local No. 537, and Personally; A. B. BARKER, RAY CERVA and HENRY OETZEL as Employees of Beatrice Creamery Company, as Members of Local No. 537, and Personally, *Defendants in Error*

Error to the District Court of the City and County of Denver, Hon. Joseph J. Walsh, Judge

En Banc. Judgment Reversed and Cause Remanded

Mr. Kenneth W. Robinson, Mr. Robert Swanson, Mr. R. Hickman Walker, Attorneys for Plaintiffs in Error.

Mr. Philip Hornbein, Mr. Philip Hornbein, Jr., Attorneys for Defendants in Error.

Mr. Lawrence Hinkley, Attorney General.

Mr. Duke W. Dunbar, Deputy Attorney General.

Barbara Lee, Assistant Attorney General, Amicus Curiae.

Mr. Justice Hays delivered the opinion of the Court:

During the month of September, 1945, five cases were filed in the district court of the City and County of Denver, allegedly growing out of the activities of the defendants in the attempt to unionize certain of plaintiffs and their employees engaged in hauling, processing and distributing milk in the Denver area. Said suits were entitled: Denver Milk Producers, Inc., Plaintiffs, v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Unions, et al., Defendants, Case No. A-45099; Harold Hennigh, E. W. Johnson, O. T. Holland and Eston Buster, Plaintiffs, v. The International Brotherhood, et al., Defendants, Case No. A-45091, Div. 1; Carl A. Borgmann and Walter Borgmann, d.b.a. Borgmann Bros., L. C. Austin and F. S. Austin, d.b.a. Austin Bros., Plaintiffs, v. The International Brotherhood, et al., Defendants, Case No. A-45106, Div. 1; Joseph Green, Plaintiff v. The International Brotherhood, et al., Defendants, Case No. A-45112, Div. 2; and Flora A. Beach, et al., Plaintiffs, v. Milk Drivers' and Dairy Employees' Local Union No. 537, The International Brotherhood, et al., Defendants, Case No. A-45223, Div. 3. In the last case mentioned plaintiffs made application for, and were granted, a temporary restraining order, enjoining defendants from the doing of certain things hereinafter mentioned. Upon the issuance of the restraining order in the Beach case, it was agreed by and between all the parties that said order should extend to each and all of said five cases. Since the restraining order was entered in the Beach case, we set forth herein the essential parts of the complaint therein, as follows:

> "14. That on or about July 31, 1945, all of the defendants except the Retail Clerks Union and the Bricklayers Union entered into a conspiracy and agreement to prevent the delivery of milk to this Company and other

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non-union dairies, and to prevent the processing, sale and delivery of said milk by this Company and other dairies to their customers in Denver and in the Denver milk-shed, unless and until this Company, the Carriers, Farmer-Producers and other dairies joined Local No. 537. That in pursuance of said plan they agreed among other things to do and perform the following acts:

"(a) To employ and train groups of Union men as pickets to carry out any and all orders of the officers of the defendant Teamsters and Drivers' Union;

"(b) To cause said pickets to follow non-union drivers of the Carriers while on their routes collecting milk;

"(c) To prevent individual Farmer-Producers from hauling and delivering any of their own milk products to any dairy in the milk-shed unless such farmer is a member of Local No. 537;

"(d) To prevent any Carrier from employing non-union drivers to work in the milk-shed, and in Denver, and to prevent any such driver from handling any milk therein;

"(e) To cause said pickets to intercept and stop all non-union drivers before they enter the grounds of or at the unloading docks of all dairies, whether union or non-union;

"(f) To order, instruct and stop all union drivers from delivering any milk to non-union dairies;

"(g) To intimidate all non-union Carriers and their non-union drivers from collecting milk from Farmer-Producers and unloading their milk at all dairies, and to accomplish the same by brawn, display of force, threats, coercion, force, blockades, interference, mass picketing, fraud, and false representations;

"(h) To intimidate and coerce all Farmer-Producers and dairies which own herds from shipping their milk by non-union Carriers and to require them to change to union Carriers when such union Carriers operate in the territory of such herds.

"(i) To unionize all non-union dairies in the milk-shed and Denver, including this Company, whether their employees desire this action or not;

"(j) To unionize and completely control and dominate the handling of all milk in the Denver area, regardless of the rights, privileges and desires of this Company, the Farmer-Producers, Carriers, drivers, the dairies and their employees, food store employees and the general public.

"(k) To compel employees of all union food stores, including Piggly Wiggly Stores, to refuse to handle non-union milk if the same is delivered to and sold at the stores where they are employed and to picket said stores if it is so delivered and sold,

"(l) To use and employ secondary boycotts in connection with said plan.

"(m) To cause great financial losses to plaintiffs, Farmer-Producers, Carriers and dairies unless and until they join the Union and obey its rules and regulations.

"15. That part of said plan and conspiracy was put into effect from July 31 to August 2, 1945, and then suspended to September 2, when the plan was again inaugurated, and since then the same has been rapidly developed and is daily becoming more and more effective. That in pursuance of said plan defendants have now acted and put into effect the operations necessary to accomplish those portions of the plan as described in paragraph 14, sub-paragraphs (a) to (h) inclusive, (j) to (m) inclusive, and the remainder of the plan will be put into operation in the near future unless enjoined by the order of this court.

"16. That said pickets have been employed and trained and put to work; that they have followed non-union drivers on their routes while collecting milk; have prevented non-union Farmer-Producers from hauling and delivering their own milk to dairies; have prevented non-union drivers from handling milk in the milk-shed; have caused pickets to intercept and stop non-union drivers; have ordered and prevented all union drivers from delivering milk to non-union dairies; have ordered employees of union dairies to

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refuse to process and handle non-union milk; have intimidated non-union Carriers and non-union drivers from unloading their milk at Denver dairies, and have employed and used brawn, display of force, threats, coercion, force, blockades, interference, mass picketing, secondary boycotts, fraud and false representations in connection therewith; have intimidated and coerced herd owners from shipping milk by non-union Carriers and have required them to change to union Carriers; have caused great financial losses to plaintiffs, Farmer-Producers, Carriers and Dairies.

"17. That among the false and fraudulent representations made by defendants are the following:

(a) Statements by said pickets to Carriers and drivers that other Carriers or all the other drivers of the Carrier (except the driver accosted), have joined the Union, and for that reason the said driver should join.

(b) Statements by said pickets that Walter C. Moore, the manager of Denver Milk Producers, Inc. desires that all Carriers and drivers should join the union.

"18. That all of said statements were false, were made with the intent that they be acted upon and they were so acted upon; that in many cases membership was secured by reason of said statements, and all without regard to the rights, privileges and desires of the plaintiffs, Farmer-Producer, Carriers, drivers, dairies, dairy employees, and the public in general.

"19. That the defendants the three Teamsters and Drivers Unions, their officers and members, since September 10th, have directed the following activities against this Company in addition to those enumerated in paragraphs 14 and 18 inclusive:

"(a) They have picketed the docks of this Company where milk is unloaded by the Carriers from entering the dock area and from unloading; have prevented all trucks driven by Union drivers from the Carriers from there unloading and ordered them not so to do, with the result that a large amount of milk consigned by the

Farmer Producers to this Company has been diverted elsewhere and lost to this Company.

"(b) They have demanded that the Company sign a union contract with Local No. 537. That because part of the ownership of the Company is in the estate proceedings in the County Court, the three Teamsters and Drivers Unions prepared and exhibited to the Company a temporary agreement with Local No. 537. This required the Company to abide by all Union rules and regulations until December 31, 1945, when the estate will be closed, and then enter into the regular formal printed contract of the Union. That signing the said temporary agreement would bind the Company to agree to all the terms of the regular 12-page printed contract and agreement of Local No. 537, which contains among other provisions the following:

"'ARTICLE 1

"'All males employees working under the classifications set up in Article 3 and who are subject to the jurisdiction of the Union, shall be members of the Union, except seasonal employees as described in Article 6. Where new employees are hired, not members of the Union, they shall make application to become members with- fifteen (15) days. The Union agrees that any new employees of the Employer, coming under the jurisdiction of the Union, as enumerated in Article 3, who are hereafter hired and are not members of the Union, shall upon making application and offering to qualify for membership in the Union, be promptly accepted to membership without prejudice or discrimination unless the applicant is specifically denied membership in the Union by the provisions of the National Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

"'It is agreed that the Employer shall notify the Union in writing on the first day of regular employment of all employees subject to the jurisdiction of the Union.

* * * * * * *

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"'ARTICLE 3

"'This agreement shall apply only to male employees of the Employer working in the following classifications, and subject to the jurisdiction of the Union:

"'1. Regular route salesmen of Dairy and Supply trucks,

"'2. Special delivery drivers and extra drivers,

"'3. Regular male plant employees, who are employees engaged in the production, or actual handling of dairy products.

"'4. Regular farm hands,

"'5. Regular Milkers.

* * * * * * *

"'ARTICLE 28

"'*Term of Agreement.* This agreement shall become effective as of April 1, 1945, and shall remain in full force and effect until April 1, 1948, * * *'

"(c) They have demanded that this Company refuse to accept milk except from Carriers with Union drivers, in violation of the Public Utility regulations and the statutes of this State.

"(d) They have threatened the Company that if it refuses to sign the agreement they will put it out of business.

"(e) They have threatened the Company with secon-boycotts; have demanded that managers and union employees of the Piggly Wiggly union stores refuse to purchase and handle milk from this Company, and have their employees, members of Local No. 7, refuse to do so; and have threatened to picket said stores if purchases of milk from this Company are not stopped at once.

"(f) They have demanded that Union bricklayers members of Local No. 1, quit work on the boiler building described in paragraph 12 until this Company signs said agreement.

"(g) They have intercepted and attempted to prevent the delivery of coal by The Rio Grande Fuel Company to this Company.

"(h) They have picketed the plant of the company in aid of a secondary boycott against all Carriers who refuse to sign agreements with Local No. 537, and against all drivers who refuse to join the Union, so as to prevent the delivery of milk to the Company until said Carriers and drivers join the Union, and to force the Company to require said Carriers and drivers to join the Union before the Company will accept delivery of milk from them.

"20. That the defendant Bricklayers Union joined in the conspiracy and unlawful act of the three Teamsters and Drivers Unions and at the end of work on September 15, 1945, established a secondary boycott against the Company, and said Union Bricklayers quit and abandoned their work on said building. That a picket line had been established against the Company on September 10. That said Union bricklayers had disregarded said picket line and worked on said Company property all of said five days regardless thereof until they joined the said conspiracy and instituted said illegal secondary boycott, which, if continued, will deprive this Company of the use of said boiler house to its great injury and damage.

"21. That on information and belief the Retail Clerks Union has joined or is about to join in the unlawful conspiracy with the other defendants in a secondary boycott against this Company delivering milk to the Denver Piggly-Wiggly Stores; and that said threatened action is imminent and is to become effective Friday, September 21, 1945, and if it does, it will effect irreparable damage upon the Company and prevent the sale of its milk to said stores. That as a result its milk will sour, its Farmer-Producers lose their market, and the people of Denver will suffer a severe shortage of milk.

"22. That many of the selected Farmer-Producers who ship their milk to the Company will be lost to it if the same has to be shipped by Union Carriers and the Company alleges on information and belief that many of its Farmer-Producers will go out of business, or ship their milk to other dairies if it signs said agreement.

"23. That on information and belief the scale of wages paid by the Company to its employees is higher than the wages paid by the Union dairies in Denver. That if the Union contract were signed by the Company, its employees stand to lose, out of said wages, the initiation fees and dues paid to Union No. 537, without any increased pay to cover the same.

"24. That the agreement proposed by the said Unions would require this Company to do an unlawful act and compel its employees to join said Union or lose their positions, and such agreement would be in violation of the Labor Peace Act and common law of this State.

"25. That the contract and agreement demanded by the defendant Teamsters and Drivers Union violate the right of the Company to select its own employees.

"26. That if the proposed contract and agreement of the defendant Local No. 537 were signed by the Company, it would compel the Company to coerce its employees to join the Union and to perpetrate an unfair labor practice, and an interference with, restraint and coercion by the Company in the rights of its employees to join or refuse to join a labor organization.

"27. That none of the defendant Unions nor any of them nor any of their members represent a majority of the male employees of this Company or any of said employees of this Company, and it would be an unfair labor practice and unlawful coercion on the part of the Company to accede to the demand of the defendants and sign said contract and agreement.

"28. That if the Company would sign the said temporary or final agreements with Local No. 537, it would

be required by the rules and regulations of said Union to refuse to accept milk deliveries from any non-union dairies, and from drivers for Carriers who have not signed Union Agreements, and would thus be required to participate in an illegal secondary boycott against said Carriers and drivers.

"29. That there is no labor dispute or controversy of any kind between the Company (employer) and any of its employees, and that none of them are organized in a collective bargaining unit. That no labor dispute as defined by the Colorado Peace Act exists in this action or in the matters alleged herein.

"30. That by the picketing of the Company against non-union Carriers and non-union drivers the defendants are attempting to coerce it to put into effect a secondary boycott against said Carriers and non-union drivers to force them to sign agreements with and join Local No. 537, all of which is illegal under the laws of Colorado.

"31. That the statutes of the State of Colorado give employees the right to refrain from joining any labor organization or from participating in any of its activities; and makes it an unfair labor practice for an employee individually or with others to hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment; to engage in a secondary boycott, or to hinder or prevent, by threats, intimidation, force, or coercion, the obtaining, use or disposition of materials, equipment or services, or to combine or conspire to hinder and prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services.

"32. That said plan and conspiracy and the acts and things done under it, and intended to be done by the defendants is illegal and in violation of Article II, Section 3 of the Constitution of the State of Colorado, the

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Statutes of the State, and the Rules and Regulations of the Public Utility Commission of Colorado.

"33. That unless restrained by this court the illegal actions of the defendants will cause many of the Farmer-Producers to stop their shipments of milk to the Company; will prevent practically all of the Farmer-Producers from so doing; will prevent the Company from completion of its badly needed boiler house; will prevent all Carriers with Union Drivers from making milk deliveries to the Company; will prevent deliveries of coal and needed supplies to the Company; will prevent the Company from selling to Piggly Wiggly Stores and other companies; and will completely ruin and destroy the business of the Company.

"34. That the Company has suffered great damages, the amount of which cannot as yet be ascertained, and will suffer irreparable damages unless the defendants and each of them are restrained by order of this court.

"35. That there is no plain, speedy or adequate remedy at law, and the continued conduct of defendants would require a multiplicity of suits."

Thereupon the plaintiffs prayed for a temporary restraining order, injunction, and damages. Said complaint in the Beach case was presented to the trial court and upon an ex parte application, Judge Steele issued a restraining order, which, omitting formal parts hereof is as follows:

"At this day come the plaintiffs by their attorney, and the said plaintiffs having filed their complaint in our District Court against the above named Defendants praying for a restraining order against said Defendants, requiring them to refrain from certain acts, in said complaint, and hereinafter more particularly mentioned. On reading the said complaint in this action, and it satisfactorily appearing to the Court therefrom, that it is a proper case for a restraining order, and that sufficient grounds exist therefor, and

the necessary and proper undertakings having been given:

"IT IS THEREFORE ordered by the Court that until the further order of said Court, you and each and every of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority or direction of you, do absolutely refrain from and desist from:

"1. In any manner establishing and maintaining a secondary boycott against the products of Beach Milk Co., at any of the Piggly Wiggly stores in Denver, Arvada and Aurora, Colorado, or at any other store in Colorado which purchases the products of the Company for resale to its customers.

"2. In any manner establishing and maintaining pickets against or about the products of the Beach Milk Co., and against said Beach Milk Co. at or about any of said stores, and in any manner publishing it as unfair to union labor to the customers of said stores, and in any manner preventing the delivery of the products of said Company to said stores.

"3. In any manner interfering with the delivery of the products of the Company to said Piggly Wiggly or other stores.

"4. In any manner, as members of Retail Clerks Union No. 7, American Federation of Labor, refusing to handle and sell the products of said Company, when delivered at the Piggly Wiggly or other stores which purchased the said products prior to September 20, 1945.

"That from the verified complaint and verified motion the court defines the injury claimed by Beach Milk Co., to be the loss of the business of the Piggly Wiggly Stores to the amount of about $535.10 per day; the permanent loss of the same; the spoilation, waste and destruction of its milk products because of the perishable quality and necessity of an immediate market; the inability of the Company in a few days or weeks to find

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customers to replace the said Piggly Wiggly; the loss of its Farmer-Producers and the milk from their fine dairy herds if the Company cannot market their products; that about half of its production goes to the Piggly Wiggly Stores; and the utter destruction of the business of the Beach Milk Co., if the alleged illegal acts of the defendants and each of them continue.

"That if said facts are true, the injuries are irreparable and plaintiffs would suffer immediate and irreparable injury, loss and damage before notice can be served and a hearing had.

"That this injunction is issued under the allegations of the complaint that the defendants seek to coerce the Plaintiff to sign an unlawful contract, and its alleged acts and conduct are to enforce such unlawful act.

"That the bond of the plaintiffs on this temporary restraining order without notice is fixed at the sum of $1000.00, and the same, signed by plaintiffs and a surety company, has been tendered to the court and approved by it.

"This case is set for hearing on the injunction issues for October 1, 1945 at 10 A. M. and shall be in full force and effect until that date unless such time is changed by the court.

"This order is issued this 21st day of September, 1945, at 9:15 A. M."

The above restraining order was entered as aforesaid in each of the other four cases and by successive orders of the district court and supersedeas here, the same has been and now is in full force and effect. It was further stipulated that in so far as the hearing on the injunctions was concerned, that the cases should be consolidated, but in the event the restraining order was made a permanent injunction, the question of damages should be tried separately in each case.

The consolidated cases were tried before Judge Walsh, and at the conclusion of plaintiffs' testimony the defendants interposed a motion to dismiss which was denied, and at the

conclusion of all the evidence the motion was renewed, and sustained.

The trial court in its ruling upon said motion to dismiss, stated that it "has come to the conclusion that this case can be decided by an answer to this question:

> "Can the State pass an act defining a 'labor dispute' so as to enjoin a union from the commission of certain acts defined to be unfair labor practices, when the purpose is to urge employer and employees to join a union, and where there exists no employer-employee relationship?
>
> "If so, many of the cases cited by counsel for the plaintiffs apply and the temporary injunction heretofore issued should be made permanent, and the question of damages determined on further trial. On the other hand, if the State is prohibited from so defining a labor dispute that the commission of certain acts deprives the defendants of certain fundamental rights secured to them by the Constitution of the United States, then the cases cited by counsel for the defendants apply and the motion to dismiss should be granted."

For a proper understanding of the above quoted question it is necessary to examine the act mentioned by the court. Section 94(16), chapter 97, 1946 Cumulative Supplement to 1935 Colorado Statutes Annot-ed (Section 16, chapter 131, page 411, S. L. '45) provides as follows:

> "Except as otherwise provided in this subdivision no court, nor any judge or judges thereof shall have jurisdiction to issue in any case involving or growing out of a labor dispute, as herein defined, any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert, any of the following acts:
>
> "(1) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement to do such work or to remain in such employment;

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"(2) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 94 (17) of this subdivision;

"(3) Paying or giving to, or withholding from any person any strike or unemployment benefits or insurance or other moneys or things of value;

"(4) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of this state;

"(5) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

"(6) Ceasing as an organization to patronize any person with which such organization has a labor dispute or to employ any person or persons;

"(7) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

"(8) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

"(9) Agreeing with other persons to do or not to do any of the acts heretofore specified;

"(10) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 94 (17) of this subdivision;

"(11) Doing in concert of any or all of the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy."

The definition of "labor dispute" to which the court in its opinion refers and which term appears in the above statute, is set forth in paragraph 7, section 94 (2) (Section 2 (7), c. 131, p. 395, S. L. '43) of the act, as follows:

> "The term 'labor dispute' means any controversy between an employer and such of his employees as are organized in a collective bargaining unit, concerning the rights or process or details of collective bargaining. The entering into of a contract for an 'all union agreement' or the refusal of an employer to enter into an 'all-union agreement' shall not constitute a labor dispute. It shall not be a labor dispute where the disputants do not stand in the proximate relation of employer and employee. No jurisdictional dispute or controversy between two or more unions as to which of them has or shall have jurisdiction over certain kinds of work; or as to which of two or more bargining units constitute the collective bargaining unit as to which the employer stands impartial or ready to negotiate or bargain with whichever is legally determined to be such bargaining unit, shall constitute a labor dispute.
>
> "The general right of an employer to select his own employees is recognized and shall be fully protected. It shall not constitute a labor dispute if an employer discharges, or refuses to employ, an employee on account of incompetence, neglect of work, unsatisfactory service or dishonesty, but the discharge of an employee, or the refusal to employ an employee, shall constitute a labor dispute only when such discharge or refusal to employ is founded upon membership in a union or labor organization or activity therein or when such discharge or failure to employ is in violation of a contract."

In order properly to determine whether or not the trial court erred in not making the temporary restraining order a permanent injunction, we deem it necessary to examine the restraining order to ascertain whether or not it violated

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the statute (Sec. 94, 16, Supra). The order restrained the defendants in substance from doing the following things:

(a) Establishing and maintaining a secondary boycott on Piggly Wiggly stores;

(b) Placing pickets around said stores;

(c) Publishing that the sale of Beach Milk products by said stores was unfair to labor;

(d) From preventing or interfering with the delivery of the Beach products to said stores; and

(e) From refusing to handle and sell said products as members of the Retail Clerks' Union.

By the act above mentioned, the Court is prohibited from restraining the commission of eleven separate and distinct acts "in any case involving or growing out of a labor dispute, as herein defined * * *." There is no prohibition against restraining those same acts in any other kind of a dispute, and no proscription against restraining the commission of acts even in a *labor dispute* other than those acts expressly set forth in the statute.

Is this a *"case involving or growing out of a labor dispute?"* The answer, of course, must be found in the application of the legislative definition, supra.

The definition may be considered as consisting of two propositions: (1) What *is* a labor dispute; and (2) what is not a labor dispute.

What *is* a labor dispute may be defined in substance to mean:

1. "Any controversy between employer and such of his employees as are organized in a collective bargaining unit, *concerning the rights or process or details of collective bargaining"*;

2. The refusal to employ or the discharge of an employee when such is founded upon membership in a union or labor organization or activity or where such discharge of failure to employ is in violation of a contract.

What *is not* a labor dispute can be said in substance to be:

1. Entering into or refusing to enter into an "all-union agreement";

2. Where the disputants do not bear the relationship of employee and employer;

3. Jurisdictional disputes between unions;

4. Disputes as to with which of two or more rival bargaining units the employer must negotiate, where employer is willing to negotiate with whichever is legally determined to be the bargaining unit;

5. Refusal to employ or the discharge of an employee on account of incompetence, neglect of work, unsatisfactory service, or dishonesty;

6. Any controversy between an employer and such of his employees as are organized in a collective bargaining unit, which does not concern "the rights or process or details of collective bargaining."

Further light upon the question as to whether or not this suit grew out of a *labor dispute* within the purview of the act can be obtained by an examination of the following excerpts from the findings of the trial court on application for permanent injunction, to-wit:

> *The Beach Milk Company, plaintiff in case No. 45223, Division 3, is a non-union dairy.* It was contacted to join the union some six or eight months prior to the time the present controversy arose, but was not interested at that time. On Sepember 1, 1945, the Beach Milk Company had a production of about 2200 gallons of milk, employed 27 persons, of whom 21 would be eligible for union membership. At the time this controversy arose they were in the process of erecting a new boiler plant which it was hoped would be in operation by November 1, 1945. The company sells milk to restaurants, hotels, the Piggly-Wiggly Stores and the Army. Its two largest customers are the United States

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Government, which takes 1000 gallons of milk daily for Buckley Field, and some 24 to 26 Piggly-Wiggly stores, supplying practically the entire supply of milk retailed by these stores. F. Leonard Beach is the Manager of the Company, which was originally a co-partnership composed of his father and mother. The father is now deceased and his estate is in the course of administration.

"The Company was contacted by Messrs. Coffey and Christol, Union representatives, on September 10, 1945 and F. Leonard Beach was advised if he did not sign a union contract his plant would be picketed and pressure would be brought to bear on the Piggly-Wiggly Stores to have them discontinue purchasing Beach Milk. Up to this time the Company was getting both 'union' and 'non-union' milk. After unsuccessful negotiations to sign up the Company and its employees in the union, the plant was picketed—the picket carrying a sign with the legend 'Unfair to Local No. 537'.

"Negotiations with union representatives extended over a number of days and also with Mr. Nathan Creamer, attorney for the Beach estate. At one of these sessions Mr. Beach asserted that Mr. Christol had said, in answer to a question by Mr. Beach as to what would happen if he did not join the union, 'the union will put forth every effort to destroy the Beach Milk Company as a business.' Mention of a secondary boycott was implied by a mention of the union's power with the Piggly-Wiggly Stores. Picketing did start on the Beach plant on September 10, 1945, and continued until the temporary restraining order was issued by Judge Steele on September 21, 1945. This interference on the part of the union caused the Company to lose producer-shippers, such as those that came over the Rein truck line which became unionized and would not deliver to his plant. The Company also maintains that it had the problem that if it did become unionized it would lose farmer-producers who had evinced animosity towards union and union dairies. From September 10th to 21st many of the company's regular

shippers were cut off and the company had to obtain milk of an inferior grade from Johnstown to make up some of the deficiency. There was also interference with the union bricklayers working on the boiler plant, who ceased employment and the Company had trouble on time in getting its coal promptly delivered by the Rio Grande Fuel Company, which employs union drivers.

"Under the Army contract the Beach Company is obligated to furnish a special grade of milk. The Farmer-producer receives a bonus for the milk produced by him and in turn the Army was permitted to buy this milk from the Beach Company at a one-half cent increase in price per quart above the OPA ceiling price. To obtain this high grade quality milk, the Beach Company installed a special inspection system whereby the herds of the farmer-producers were regularly inspected and scientifically improved methods of production imposed on the farmer-producers and insisted on. Loss of the Piggly-Wiggly and Army business would have been serious to the Company because it would have had a large supply of milk for which there would have been no outlet.

"There was no denial on the part of the union that it had had negotiations with Mr. Beach looking to unionizing the plant, that it had established a picket line, that a number of union representatives had congregated across the street one day, and that the truck drivers delivering the milk to the dairy were contacted in an attempt to get them to join the union, but stated that all of this was done in a peaceable manner, without any disturbance and with no threat of violence.

"During this period of time the Almhurst Dairy and the Stearns Dairy suffered interference. With respect to the Almhurst Dairy, it was a non-union dairy and, like the Beach Milk Company, was engaged in construction work under a union contractor employing union labor. Lenus Alm is the owner of the Almhurst Dairy, located at 190 West Nevada and has seven employees. It is a member of the Denver Milk Producers associa-

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tion and, as stated, was a non-union dairy prior to September 20th or 21st, since which time it has become unionized. Sometime in September, 1945, there were three union bricklayers working on the addition which was to cost somewhere in the neighborhood of $40,000.00 and about four more weeks were needed to complete the building. His employees had never asked whether they should join or not join the union. Union representative Coffey and Christol contacted him sometime before September 17th. They had a union contract and wished him to sign, and advised him at that time that they had Beach about signed up. Tuesday, September 18, 1945, he was again contacted and asked if he was ready to sign up and he asked Coffey and Christol to come to his home to discuss the matter because they could discuss it more quietly. In the meantime he had talked to James Logan and Mr. Hall of the Colorado Employers Council and had advised them that he was going to be picketed unless he joined the union and wanted their advise. His place was picketed, so he called Coffey from Logan's office and Coffey promised to take the picket off if he signed, so he did sign a union contract on September 20th or 21st, but frankly states that he would not have signed if the union bricklayers had not struck. He maintained that he was paying more than the union scale to his employees. He also contacted Mr. Moore of the Denver Milk Producers association, who advised him he did not have to sign with the union and Mr. Moore thought he could get milk into his plant without his signing. In his discussions with his employees about joining the union some said they would and some said they would not.

"With respect to the Stearns Dairy, on April 3, 1945 they had signed a contract with the union, but certain conditions of the contract as to wages and commission had not been agreed upon. These issues had been submitted to a panel of the National War Labor Board, but the Board had failed to issue directive order and the matter had been referred back to the employer and employees. Mr. Hillmeyer, President of the Stearns Dairy, was contacted one morning somewhere between

4:30 and 5:00 o'clock, A. M., and advised that if he did not sign a union contract his milk would not go out. After some bickering, he acceded to the demands of the union. The Stearns Dairy used to receive milk delivered by non-union carriers, and upon being advised that his employees could and would not work on this milk he was compelled for over a week to haul his own milk. Mr. Coffey, the union representative, admitted that there was a controversy with the Stearns Company and with respect to the refusal of the drivers to deliver milk on September 7, 1945. Mr. Coffey claimed that Mr. Hillmeyer had broken an appointment to settle the matter, but that the matter was finally settled, namely, on the morning of September 7, 1945, by Mr. Hillmeyer agreeing to the union's conditions, namely, paying back pay of $100.00 and $210.00 per month to the drivers.

"In carrying out the threat of a secondary boycott made by the union representatives to the Beach Milk Company, various union officials, namely, Coffey, Christol, Pixler, Dinsmore and Maxwell (the latter representing the Retail Clerk's Union) contacted Mr. E. H. Lambotte, President of the Piggly-Wiggly Stores Company, which operates under a franchise from the main office with headquarters in Atlanta, Georgia. Some nine owners or managers of Piggly-Wiggly stores were also contacted, Mr. Lambotte discussed the milk situation with Mr. O'Neal, Mr. Coffey and Mr. Voorhies (the latter a representative of the Bakery Drivers Union). Mr. Lambotte was advised on September 11, 1945, that the union was having trouble with the Beach Milk Company and he was requested to use his good offices in trying to persuade Beach to sign a union contract, and he was advised that if Beach refused it might be necessary to establish a secondary boycott of the Piggly-Wiggly stores. Lambotte did call Beach. On September 19, 1945 Coffey advised Lambotte that the union was going to picket the Piggly-Wiggly stores. Coffey was considerate of their position and advised him to have the stores make their arrangements for a milk supply.

"The Company has no special policy as to whether its stores are union or non-union, leaving it to the individual store whether to unionize or not. Lambotte was advised by Mr. O'Neal that no picket line would be established until they got another supply. However, on Thursday, September 20th, he was advised that the stores would be picketed the next day, so he advised Beach not to deliver and also contacted every Piggly-Wiggly store as to the situation. The issuance of the temporary restraining order obviated further action, as Beach was allowed to continue deliveries. He states that Piggly-Wiggly relations with the union had been friendly and all of the negotiations he had were conducted in a businesslike manner without threats. He was confident no store would accept Beach milk if it was picketed.

"As stated, some nine Piggly-Wiggly owners and managers were contacted prior to September 20th, four of them being union and five non-union stores. They were advised not to accept Beach milk and there were instances where the union representatives were angry because certain owners had accepted milk after being advised not to do so. In one instance William White, manager of Piggly-Wiggly store at 1211 East Alameda, was advised by Mr. Dinsmore on September 20, 1945, that there was trouble with Beach and stated to Mr. White, 'I am telling you now if you accept milk tomorrow from Beach we will slap a picket on the store.' The Piggly-Wiggly stores got practically all of their supply of milk from the Beach Milk Company."

We have taken the above excerpts from the findings of the trial court as they pertain to the Beach case because, as above stated, the temporary restraining order set forth in this record was issued in the Beach case, and, by stipulation extended to the other cases. It would unnecessarily lengthen this opinion to quote all the facts contained in the findings of the trial court pertaining to the other cases, in view of the stipulation of counsel that the facts are sufficiently similar to justify the issuance of the temporary re-

straining order in each of the cases, and especially in view of the following statements of the trial court in its findings:

> "These cases were argued and submitted together and may be disposed of in a single opinion because the law involved governs the general factual situation existing in all of the cases.
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> • • • • • • •
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> The situation existing in each case may be gathered from the foregoing general statement of facts. Of course, some of the facts overlap in the various cases, while other facts are pertinent only to a particular case. However, in general the situation must be viewed as constituting one controversy."

From the above and foregoing it is apparent, and we so find, that Judge Walsh, in his findings on the hearing on injunction, reached the proper, logical and inescapable conclusion that if the definition of "labor dispute" is valid "many of the cases cited by counsel for the plaintiffs apply and the temporary injunction heretofore issued, should be made permanent, and the question of damages determined on further trial."

The principal question herein is whether or not the legislative definition of "labor dispute" set forth in section 2, paragraph 7, chapter 131, Session Laws 1943, is valid. In this connection the trial court said:

> "The court feels that the definition of a 'labor dispute' as defined in the Colorado Labor Peace Act of 1943, is too strained and narrow. That if the conduct of defendants can be classified so as to make them guilty of unfair trade practices under that narrow definition, and if this definition be permitted to stand, that there has been an invasion of their constitutional rights."

To reach a proper conclusion on the above question, section 16 of the act must be considered with said paragraph 7 of Section 2. When so considered and taken together, those sections mean that courts of Colorado are divested of

all jurisdiction to grant restraining orders or injunctions which prohibit any person from doing certain specific things therein mentioned "in any case involving or growing out of a 'labor dispute,' as herein defined."

In the absence of any statute on the subject there is no restriction on the courts in granting restraining orders or injunctions in any case. It is only in cases involving "labor disputes" that the court does not have jurisdiction to grant such orders. The statute does not take away any rights from defendants, but bestows upon them additional rights in "labor disputes" not theretofore possessed. It creates a defense in labor disputes against actions for restraining orders and injunctions not permitted in other disputes. The gist of the defendants' argument is that the statute is void and unconstitutional because it is not more generous. The same argument could be advanced against the Workmen's Compensation Act of Colorado because it allows fourteen dollars a week for temporary total disability instead of awarding a larger sum. There is no constitutional right to have an act passed by the legislation divesting courts of jurisdiction in specific cases and no one has a constitutional right to a repeal of said act. The legislature created the defense and by the same token can take it away. If the act is held invalid, as defendants ask, the statutory defenses permitted in labor disputes would be eliminated and such controversies controlled by the general rules of this court as in other cases. That is not what the defendants really want. They seek to have the definition, "labor dispute" so liberalized as to include a larger field wherein no injunction may issue. Naturally we have no power or authority to legislate upon the subject and such arguments should be addressed to the general assembly and not to this court.

Unless the Constitution in express terms or by necessary implication limits it, the legislature may exercise its sovereign power in any way which in its judgment will best subserve the general welfare. *People v. Richmond,* 16 Colo. 274, 26 Pac. 929; *In re Kindergarten Schools,* 18 Colo. 234, 32 Pac. 422.

The legislature may enact any law not expressly or inferentially prohibited by the Constitution of the state or nation. *Mauff v. People*, 52 Colo. 562, 123 Pac. 101.

It has many times been held by this court that the legislature has plenary power to legislate, subject only to limitations of state and federal Constitutions. *Colacino v. People*, 80 Colo. 417, 252 Pac. 350; *People, ex rel. v. McNichols*, 91 Colo. 141, 13 P. (2d) 266; *Metzger v. People*, 98 Colo. 133, 53 P. (2d) 1189.

An "act is not unconstitutional because it changes the rule of public policy." *Rifle Potato Growers Assn. v. Smith*, 78 Colo. 171, 240 Pac. 937.

Courts should not legislate, neither should they destroy legislation when by careful and conservative decision legislative enactments may be upheld, and any unnecessary overthrow of an act of the general assembly by judicial decision is as much a usurpation of legislative power as an attempt at affirmative legislation. *In re House*, 23 Colo. 87, 46 Pac. 117, 33 L. R. A. 832; *Lewis v. Parker*. 4 Colo. Law Report 300.

The question of the wisdom, justice, policy or expediency of a statute are for the legislature alone and not for the courts. *Schwartz v. People*, 46 Colo. 239, 47 Colo. 483, 104 Pac. 92; *Martin v. People*, 69 Colo. 60, 168 Pac. 1171; *Chicago Title & Trust Co. v. Patterson*, 65 Colo. 534, 178 Pac. 13.

In *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P. (2d) 145, the whole act, chapter 131, S. L. '43, was challenged as to its legality, and this court, on review, held that sections 20 and 21 of said act were invalid in their entirety, and that certain other minor provisions which are closely related to and dependent upon said sections, were likewise invalid, and we refused to pass upon the constitutionality of other sections of act.

A controversy, similar in many respects to the instant one, was considered, by the Supreme Court of the United States in the recent case of *United States v. United Mine Workers and John L. Lewis*, 67 S. Ct. 677, 91 L. Ed. 595, decided March 6, 1947. That case involved the Norris-LaGuardia act of congress, which is very similar and in

many particulars identical to the Colorado Labor Peace Act. Section 4 of the Norris-LaGuardia act provided:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:"

Immediately following the above is set forth specific acts which the courts are prohibited from restraining or enjoining.

The petitioner in the above case made application to the United States Court of Appeals for the District of Columbia for an order restraining the commission of certain acts, and the court ordered among other things:

> "That the defendants and each of them and their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be and they are hereby restrained pending further order of this court from permitting to continue in effect the notice heretofore given by the defendant, John L. Lewis, to the Secretary of Interior dated November 15, 1946; * * * and from coercing, instigating, inducing, or encouraging the mine workers at the bituminous coal mines in the Government's possession, or any of them, or any person, to interfere by strike, slow down, walk out, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through any other means or device. * * *"

Thereupon the mine workers and Lewis filed a motion—as did the defendants here—to vacate and discharge the restraining order upon the grounds:

> "(1) The temporary restraining order is void in that this case involves and grows out of a labor dispute.

Under the provisions of the Norris-LaGuardia act (47 Stat. 70) and the provisions of section 20 of the Clayton Act, 38 U. S. Stat. c. 323, p. 730, 29 U. S. C. A. Sec. 52, this Honorable Court is without jurisdiction over the subject-matter of this cause."

• • • • • • •

"(5) The temporary restraining order is beyond the jurisdiction of this Honorable Court and therefore void because it contravenes the First, Fifth and Thirteenth Amendments to the Constitution of the United States."

The motion of the mine workers and Lewis to discharge and vacate the temporary restraining order was denied by the trial court. The court held in substance that the case did not involve or grow out of a labor dispute within the purview of the Norris-LaGuardia act and that the restraining order did not contravene the First, Fifth and Thirteenth Amendments to the United States constitution. In affirming the judgment of the trial court, the United States Supreme Court said:

"If we examine sections 4 and 13, on which defendants rely, we note that they do not purport to strip completely from the federal courts all their pre-existing powers to issue injunctions, that they withdraw this power only in a specified type of case, and that this type is a case 'involving or growing out of any labor dispute'."

While the above case was decided upon questions not presented here, it is pertinent to observe that all parties assumed that the Norris-LaGuardia act was in all respects valid, and apparently its validity was conceded.

One of the principle points upon which the above decision is predicated is that the word "person" was not broad enough to include the government and therefore that the Norris-LaGuardia act did not apply. There are many statements by the court throughout the opinion which clearly indicate that the question as to whom the act should apply,

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and as to whether the scope thereof should be narrow or broad, is within the exclusive province of Congress.

In the course of the opinion in the United Mine Workers case, in speaking of the effect the Norris-LaGuardia act had on Clayton Act, it was pointed out that it had held in a former case "that the Norris-LaGuardia act 'still further • • • (narrowed) the circumstances under which the federal courts could grant injunctions in labor disputes'." Under the circumstances, no one could seriously contend that the Clayton act was unconstitutional or invalid because it was more liberal than the Norris-LaGuardia act or that the latter was invalid and unconstitutional because it was narrower than the former.

Defendants in the present case, however, contend in substance that if the restraining order is made permanent, they will be deprived of their rights under the First, Thirteenth, and Fourteenth Amendments to the Constitution of the United States. As noted above, defendants in the United Mine Workers and Lewis cases made the same contention but the United States Supreme Court held otherwise, and concluded:

> "We have examined the other contentions advanced by the defendants but have found them to be without merit. The temporary restraining order and the preliminary injunction were properly issued, and the acts of the district court in these respects are affirmed. • • •"

The "other contentions" mentioned by the court includes the one made by the defendants that the restraining order "contravenes the First, Fifth and Thirteenth Amendments to the Constitution of the United States."

Upon the general subject of the validity of statutes similar to the Colorado Labor Peace Act and the Norris-LaGuardia act, there is an extensive note in 124 A. L. R., 752, supplementing earlier annotations on the subject, in which the author says:

> "The cases decided since the publication of the last annotation on the present subject, in 120 ALR 316, seem to concern themselves principally with the operation and effect of the various statutes restricting the

remedy of injunction in industrial disputes, particularly dealing with the questions whether the controversy in question is of the character or involves the parties contemplated by the statute in its restrictive application. *The validity of such statutes generally seem to be accepted without question.*"

On February 19, 1947—after the briefs were filed in the present case—the Supreme Court of Washington rendered a decision in *Swenson* v. *Seattle Central Labor Council*, (Wash.) 177 P. (2d) 873, which is very significant in the present controversy because it discusses many of the important cases cited and relied upon in the briefs herein; it answers many constitutional questions herein raised; it clarifies the law as to picketing; and because of the similarity of the facts to those in the instant case will be helpful to the trial court on further proceedings. We quote, with approval, from the opinion as written by Justice Schwellenbach:

"Finally, it is contended that, regardless of any statute, the men had an absolute right to peacefully picket as an exercise of the right of free speech guaranteed them under the Federal constitution. Amend. 1. We have read all the decisions of the United States Supreme Court on this subject, commencing with Thornhill *v.* State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, through Carpenters and Joiners Union of America *v.* Ritter's Cafe, 315 U. S. 722; 62 S. Ct. 807, 808, 86 L. Ed. 1143. In the latter case, the respondent had made an agreement with a contractor named Plaster for the construction of a building in Houston, Texas. Plaster employed non-union carpenters and painters in the work. The respondent was also the owner of a cafe, a mile and a half distant from the building under construction. The new building was wholly unconnected with the cafe. All the restaurant employees were members of the Hotel and Restaurant Employees International Alliance, Local 808. There was no controversy between respondent and the restaurant employees. The carpenters' and painters'

unions had no quarrel with respondent over his operation of the cafe. No carpenters or painters were employed there.

"But because Plaster employed nonunion labor in the construction of a building a mile and a half away, members of the unions picketed the respondent's cafe. Walking back and forth in front of the restaurant, a picket carried a placard which read: 'This place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor.' Later, the wording was changed as follows: 'The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who Is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated with the American Federation of Labor'.

"The Texas court found that Ritter's Cafe was picketed 'for the avowed purpose of forcing and compelling plaintiff (Ritter) to require the said contractor, Plaster, to use and employ only members of the defendant union on the building under construction in the 2800 block on Broadway'. Contemporaneously with this picketing, the Restaurant Workers Union, Local No. 808, called Ritter's employees out on strike and withdrew the union card from his establishment. Union truck drivers refused to cross the picket line to deliver food and other supplies to the restaurant. The effect of all this was 'to prevent members of all trade-unions from patronizing plaintiff's cafe, and to erect a barrier around plaintiff's cafe, across which no member of defendant-unions or an affiliate will go.'

"The Texas court enjoined this procedure, but the decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant.

"On page 724 of 315 U. S., on page 808 of 62 S. Ct., 86 L. Ed. 1143, the court stated:

" 'The economic contest between employer and employee has never concerned merely the immediate dis-

putants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the context. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

" 'The task of mediating between these competing interests has, until recently been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation to determine what te public welfare demanded, whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property, whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy, and to what extent incidental injury to persons not parties to the controversy should be held justifiable." Mr. Justice Brandeis in Truax *v.* Corrigan, 257 U. S. 312, 363, 42 S. Ct. 124, 141, 66 L. Ed. 254, 27 A.L.R. 375. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in Aikens *v.* (State of) Wisconsin, 195 U. S. 194, 205, 25 S. Ct. 3, 49 L. Ed. 154, and Mr. Justice Brandeis in Truax *v.* Corrigan, supra, 257 U. S. at page 372, 42 S. Ct. (124) at page 144, 66 L. Ed. 254, 27 A.L.R. 375; Dorchy *v.* (State of) Kansas, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. Ed. 248, and Senn *v.* Tile Layers Protective Union, 301 U. S. 468, 481, 57 S. Ct. 857, 863, 81 L. Ed. 1229. But the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect

the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.

" 'The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved. Thornhill *v.* (State of) Alabama, 310, U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. American Federation of Labor *v.* Swing, 312 U. S. 321, 61 S. Ct. 735, 85 L. Ed. 1145. But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of 'liberty', the question always is whether the state has violated 'the essential attributes of that liberty'. Mr. Chief Justice Hughes in Near *v.* (State of) Minnesota, 283 U. S. 697, 708, 51 S. Ct. 625, 628, 75 L. Ed. 1357. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies 'to promote the health, safety, morals, and general welfare of its people * * *. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.' Id., 283 U. S. at page 707, 51 S. Ct. 625, 75 L. Ed. 1357. 'The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.' Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 355, 28 S. Ct. 529, 531, 52 L. Ed. 828, 14 Ann. Cas. 560.

" 'In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare. • • •

" 'It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arise leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

" 'In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that the rights of employers and employees to conduct their economic affairs and to com-

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pete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' Thornhill *v.* (State of) Alabama, 310 U. S. 88, 103, 104, 60 S. Ct. 736, 745, 84 L. Ed. 1093.

"The United States Supreme Court has, by these cases, established this rule: Peaceful picketing is an exercise of the right of free speech. Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion. But when picketing ceases to be used for the purpose of persuasion—just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech, and a person or persons injured by its act may apply to a court of equity for relief.

"The facts in this case convince us that the picketing complained of did not constitute an exercise of free speech as contemplated by our founding fathers. Neither was it a means of communicating the facts of a labor dispute as interpreted by the United States Supreme Court. The National Labor Relations Board had, by order, designated the International Association of Machinists as the exclusive bargaining agency of all the employees at the plant. The purpose of the picketing was to force the employer to deal with the picketing unions in defiance of this order, under the threat that, should he refuse to do so, his plant would be closed and his equipment prevented from being installed any place in the United States. This was coercion. Appellant was forced to close his plant. This resulted in irreparable loss to him, and his employees were thrown out of employment. He had no adequate remedy at law. The restraining order theretofore entered should have been continued."

The conclusion is inescapable, and we so hold that the Colorado Labor Peace Act, in so far as applicable here, is

in all respects constitutional, valid and enforceable, and that this is not a case "involving or growing out of a labor dispute" as defined in the act. We also hold that there is no merit to the contentions of the defendants in error that their constitutional rights under the First, Thirteenth, and Fourteenth Amendments to the Federal Constitution will be violated, if the injunction is made permanent.

The Judgment is reversed and the cause remanded with instructions to reinstate the restraining order and make the same permanent, and for further proceedings with respect to damages and otherwise as may be necessary, such proceedings to be in harmony with the views herein expressed.

MR. JUSTICE STONE and MR. JUSTICE HILLIARD concurring in part and dissenting in part.

MR. JUSTICE JACKSON concurs in the conclusion.

May 19, 1947.

Mr. Justice Stone concurring in part and dissenting in part.

Temporary injunction in this case was issued on the basis of the allegations of the complaint. Permanent injunction must be justified by the evidence.

Counsel for plaintiffs in their brief urge reversal on the ground of assertedly tortuous acts concerning which evidence was adduced at the trial. The acts upon which plaintiffs rely are set out in their brief and may be summarized as follows:

First: Threats to injure and destroy the business of plaintiffs unless they should sign union contracts. The only threats testified to were vague and general, such as the alleged statement to the owner of a truck line that "we will get you by hook or crook," and the Beach, that if he would not join the union, "the union will put forth every effort to destroy the Beach Milk Company as a business." Such vague and indefinite threats, even in the absence of denial, were not sufficiently specific and definite to constitute a background of violence in connection with other acts or to serve as basis of claim for damages or injunction.

Second: Display of force against the truck drivers of nonunion carriers and dogging them on their routes. The only evidence in the record as to this charge is that on one occasion, some twelve days before this action was begun, several union representatives congregated in cars across from the headquarters of a trucking concern and that one or more of them in a car followed each of the truckers as he went over his route picking up cream and carrying it to its destination in the city of Denver. As the trial court found, this "instilled fear into the heart of the driver." Defendants say this action was taken for the purpose of investigating the sources from which the nonunion truckers obtained their milk and the destination to which it was delivered. There was no actual interference, no work of threat, no prevention of any trucker from carrying out his duties, and no attempt or threat of repetition of the act. No ground for damages or injunction can be based thereon.

Third. Prevention of nonunion carriers from delivering milk to union dairies by means of directions given employees, by picketing union dairies and by threatening strike. The evidence as to this charge discloses that for the purpose of accomplishing the objective of the union to organize the entire milk trucking industry in Denver, representatives of the union were stationed about certain union milk processing plants and that when a driver approached such plant he was asked if he had a union card; if not, he was quietly asked to join the union. Upon his refusal he was told he could not unload at that plant and, when he approached the dock, the union employees there refused to handle the milk. On one occasion a picket was posted at a union plant, but upon protest by the manager, he was told it was a mistake and the picket was withdrawn. This act may be considered together with a fourth act charged by plaintiffs: that the defendants threw a picket line around the plant of the Beach Milk Company with the customary "unfair" legend and with the usual result of preventing delivery of milk by union drivers and interfering with the delivery of supplies and materials and helping induce union bricklayers engaged in urgent construction work at the plant to cease work. The evidence discloses that after soliciting Beach to sign an

all-union contract without success, the defendants threw a picket line about the Beach plant consisting of one picket carrying an "unfair" sign. The first day there were four or five other union members standing across the street. Thereafter there was seldom any union member present except the picket. There was no violence, nor threat of violence. There was occasional soliciting of an employee to join the Union, but no interference or persistence in so doing. Did such acts, third and fourth, constitute unfair labor practice under the terms of the Colorado Labor Peace Act, and if so, were they sufficient basis for damages and injunction?

In answering this question we are not dealing with novel translation of economic theory, but with rules of constitutional right which, even if apparently not following earlier trends of interpretation, have been repeatedly declared by this court and the Supreme Court of the United States. At the time of the passage of the Labor Peace Act this court in *People v. Harris*, 104 Colo. 386, 91 P. (2d) 989, *Denver Union v. Truck Lines*, 106 Colo. 25, 101 P. (2d) 486, and *Denver Union v. Buckingham Co.*, 108 Colo. 419, 118 P. (2d) 1088, and the United States Supreme Court in *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 735, 84 L. Ed. 1093, and *American Federation of Labor v. Swing*, 312 U. S. 321, 61 Sup. 568, 85 L. Ed. 855, had declared that peaceful picketing is a form of free speech, and, as such, protected by constitutional guaranty.

Perhaps because of actual familiarity with those decisions, the legislature specifically declared in the Labor Peace Act (S. L. '43, c. 131), that, "The right of both employer and employee freely to express, declare and publish their respective views and proposals concerning any labor relationship shall not be abrogated or limited by this act, nor shall the exercise of such right constitute an unfair labor practice," section 7(2), and further declared in section 24, "nor shall anything in this act be so construed as unlawfully to invade the right to freedom of speech." The provision in section 6(e) declaring that to cooperate in engaging in or inducing picketing is an unfair labor practice must, then, be construed in harmony with section 7(2) and 24 as to the right of free speech, if possible, and so

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construed, the word "picketing" as employed in the act must be held as intended in its coercive, and not in its persuasive, sense. Otherwise the limitation on picketing constitutes a limitation on the right to express views concerning labor relationships and invades the right to freedom of speech, contrary to the explicit provisions of the statute.

That such is the proper interpretation is borne out by the fact that our Labor Peace Act was patterned on, and followed closely, the Wisconsin Labor Peace Act. Our provision as to picketing is copied verbatim from the Wisconsin act. The Supreme Court of Wisconsin in *Hotel Employees Local v. Board*, 236 Wis. 329, 294 N. W. 632, affirmed a judgment restraining picketing as an unfair labor practice. The case was taken to the United States Supreme Court on the ground that it enjoined peaceful picketing and consequently freedom of speech. That court, speaking through Frankfurter, J., said: "Precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine, * * * And that court has unambiguously rejected the construction upon which the claim of the petitioners rests.

"That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the court: 'The act does not limit the right of an employee to speak freely. * * * The term "picketing" as used in (the act), does not include acts held in the *Thornhill case, supra*, to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill case* says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents." ' * * * In this case it is undisputed that numerous assaults were committed by the pickets, that the pickets acted in concert; that the fines of these pickets were paid by the union; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair

labor practice by the statute and from which the defendants are ordered to cease and desist." *Hotel & Restaurant Employee's Local v. Board*, 315 U. S. 437, 62 Sup. Ct. 706, 86 L. Ed. 946. See, annotation, 149 A. L. R., at page 469.

So construing our Labor Peace Act, there is no actional claim, nor ground for injunction resulting either from the so-called picketing at the union creameries or from the picketing at the Beach plant. Neither was a violation of the Act.

Whether injunction would lie if peaceful picketing were specifically forbidden by the act we are not now called upon to determine, but, note the statement of Jackson, J., in the opinion of the court in *Bakery etc., Drivers Local v. Wohl*, 315 U. S. 769 (62 Sup. Ct. 816, 86 L. Ed. 1178) at page 774: So far as we can ascertain from the opinion delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes, and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." As to the peaceful picketing there considered, the court said: "We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the

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public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue."

As a fifth act, plaintiffs charge that the defendant caused union bricklayers who were engaged in necessary construction work at the Beach Dairy to cease work to the damage of plaintiff Beach. There is no suggestion, either in the brief or the evidence, that the work stoppage was caused by any act other than the picketing of the Beach plant hereinabove discussed, and the consequent refusal of the union bricklayers to cross the picket line. Such charge is not a separate act, but only one of the results of the act of picketing hereinabove discussed.

As a sixth and last tortuous act plaintiff charges that the defendants called upon the managers of the Piggly-Wiggly stores, some twenty-five in number, in and near the city of Denver and threatened to picket those stores unless they immediately ceased to sell milk of the Beach dairy. This charge is sustained by the evidence. As said by the trial court in its findings: "In carrying out the threat of a secondary boycott made by the union representatives to the Beach Milk Company, various union officials * * * contacted Mr. E. H. Lambotte, President of the Piggly-Wiggly Stores Company * * *. Some nine owners or managers of Piggly-Wiggly stores were also contacted. * * * Mr. Lambotte was advised * * * that if Beach refused it might be necessary to establish a secondary boycott of the Piggly-Wiggly stores. * * * Coffey advised Lambotte that the union was going to picket the Piggly-Wiggly stores." Thus the trial court found that a secondary boycott was threatened. The purpose of the union in its dispute with Beach was to organize the milk processing industry of Denver. The Piggly-Wiggly stores, while together constituting one of Beach's best customers, were not in anyway engaged in the business of processing milk. They were engaged in the retail grocery business. Their sale of milk was a very minor part of such business. Picketing those grocery stores, as an indirect means of exerting economic pressure in a dispute involving only the milk processing industry, was a plain violation of the Labor Peace Act;

it would have caused violent "repercussions upon the interests of strangers to the Issue," and it so far extends the orbit of industrial dispute and so "conscripts neutrals" as to be, I believe, within the authority of regulation by the state legislature as indicated by the decisions of the federal courts. As said in *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722 (62 Sup. Ct. 807, 86 L. Ed. 1143), "Recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phrase of the controversy which provoked the picketing. Such a view of the Due Process Clause (in the Fourteenth Amendment) would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."

Accordingly, in my opinion the injunction against threatened boycott by picketing the Piggly-Wiggly stores as unfair should be made permanent, and the case should be remanded for the determination of the question of damages, if any, suffered as a result of threat of such picketing, and that as to the other issues the action should be dismissed.

Mr. Justice Hilliard concurs in this opinion.